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The Sherman Act: Its Relation to the Common Law.

By

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(A.B., Boston, 1910; A.M., Boston, 1911; LL.B., Boston, 1912.)

A Dissertation

submitted in partial fulfilment of the
requirements for the
degree of Doctor of Philosophy.

GRADUATE SCHOOL

BOSTON UNIVERSITY

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Sherman act
" Common law
" Monopolies

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Analysis:

The Sherman Act: Its Relation to the Common Law.

The thesis of this dissertation is embraced in the following syllogism: 1. The common law follows certain well defined rules in regard to restraint of trade and monopolies. 2. The Sherman Act, under the cases now recognized as authoritative, follows the same rules. 3. Therefore common law principles may be used to determine the application of the Act. It follows as a corollary that "the rule of reason" is the rule of what has been decided to be reasonable in the decisions of the common law.

In Heydon's case, 3 Coke 7, the Barons of the Exchequer lay down the following rules: "For the sure and true interpretation of statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) A What was the common law before the making of the act? (2) B What was the mischief and defect against which the common law did not provide? (3) C What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) D The true reason of the remedy." It will be seen that the major premise of the syllogism is contained in (1), and the minor premise in (2), (3), and (4). The discussion accordingly falls under those heads.

I. The Common Law. (Major Premise.)

A. "What was the common law before the making of the act?"

1. Restraint of trade.

a. Classification of restraint of trade.

(1) Involuntary restraints.

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(a) Grants or charters from the crown.

a' A new charter of incorporation to trade generally. This is void. 8 Co. 121.

b' A grant to particular persons for the sole exercise of any known trade. This is void because it is a monopoly, and against the policy of the common law and Magna Charta. 11 Co. 84.

c' Grant of sole use for a newly invented art. This is good because it encourages ingenuity in the trades.

(b) Restraints by custom.

a' Such as are for the benefit of some particular persons who are alleged to use a trade for the advantage of a community. These are good. 8 Co. 125. 2 Bulst. 195.

b' Such as are for the benefit of a community of persons who are not alleged but are supposed to use the trade in order to exclude foreigners. 8 Co. 121. This was abolished by St. 5 and 6 W. 4, c. 76 s. 14.

c' A custom may be good to restrain a trade in a particular place though none are ever supposed or alleged to use it.

(c) Restraints of trade by by-laws.

a' To exclude foreigners. This is good if only to enforce a precedent custom by penalty. 1 Roll. Abr. 364.

b' All by-laws made to cramp trade in general are void.

c' By-laws made to restrain trade, for the better gov-

ernment regulation of it are good, if

a'' They are for the benefit of the place.

b'' To avoid public inconvenience, etc.

c'' For the advantage of the trade. Raym. 288.

(2) Voluntary restraints.

(a) General restraints. These are all void, whether by bond, with or without consideration, and whether it be the party's own trade or not.

(b) Particualr restraints.

a' Without consideration. These are void.

b' With consideration. Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good, or

(2) Voluntary restraints.

(a) Trade of one of the parties restrained.

a' Limited in regard to the time or place. This is good.

b' Unlimited in regard to time or place. This is always bad.

(b) Trade of another restrained, i. e., a contract to restrain, not in restraint of trade.

a' If the parties have no business of their own of that nature the contract is bad, as the justification of promoting another trade is wanting and it is done maliciously.

b' If the natural and expected result is to restrain C's trade but for the benefit of their own, and by

lawful means, it is good as it promotes one trade as much as it injures the other.

c' If unlawful means are used , the contract is always bad.

b. Discussion of the elements of contracts in restraint of trade.

(1) From the point of view of the public.

(2) From the point of view of the individual.

c. Requisites of legitimate restraint.

(1) The contract must be partial.

(2) The consideration must be adequate.

(3) The restraint must be reasonable.

(a) Injury to the party restrained.

(b) Injury to the public.

(c) Use to the obligee.

2. Monopolies.

a. Classification of monopolies.

(1) Monopolies by franchise.

(a) Mediaeval franchises. This accompanied the monopoly system - frankfold and park, warren and piscary, smithy and bakehouse, mill and market. Fitzwalter's case, 3 Keb. 242. In the towns the trading and craft guilds were also monopolies. Freemantle v. Silk Throwsters, 1 Lev. 229.

(b) Patents and monopolies. These were originally instituted towards the end of the sixteenth century as a method of encouragement to new enterprises and large industries, but soon began to be felt as a

great burden when the ordinary trades and commodities were granted in this way as rewards to court favorites. Case of Monopolies, 11 Co. 84 b.

(c) Modern franchises. The test of the validity of the franchise in modern times is the safety and interest of the public.

a' Public health.

a'' Cleaning streets, etc. In re Vandine, 6 Pick. 187

b'' Slaughtering of animals. Boyd v. Montgomery 117 Ala. 677.

b' Public safety.

a'' Sale of liquor. Lowenstein v. Evans, 69 Fed. 908.

b'' Fiduciary business. People v. San Francisco 100 Cal. 605.

c'' Skilled employments. The State v. Wilcox, 64 Kan. 789.

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a'' Schools. Bancroft v. Thayer, 5 Sawy. 502.

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d' Public services.

a'' Transportation. Wood v. Seattle, 23 Wash. 1.

b'' Public utilities. People v. People's Gas Light etc. Co. 205 Ill. 482.

(2) Monopolies by combination.

(a) Early forms of monopolization.

a' Forestalling the market. This consisted of buying up necessaries on their way to market or contracting for the control of anything coming toward the

market, or even of holding out inducements to raise their prices or withhold their commodities from market. Botelor v. Washington, 2 Cranch. C.C. 676.

b' Regrating. This consisted of buying necessaries after they were in the market, with intent to sell them in the same market at an advanced price, or even contracting for the delivery of goods in advance of the market with like intent. Rex v. Rusby, 2 Peake N. P. 189.

c' Engrossing the market. The buying of necessaries at markets or elsewhere with intent to sell again, and especially much buying of this sort with such intent constituted the offence. Rex v. Maynard Cero. Car. 231.

d' Conspiracies against trade. From earliest times if several combined to control trade or advance prices it was a serious offence whether actual injury resulted or not. Anon. 12 Mod. 248.

(b) Modern forms of monopolies.

a' Pools. Swift v. United States, 196 U.S. 375.

b' License or lease. Oliver v. Gilmore, 52 Fed. 562.

c' Trusts or similar devices. Gould v. Head, 38 Fed. 886.

d' Holding corporations. McCutcheon v. Weiz Capsule Co. 71 Fed. 787 contra, Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507.

b. Discussion of the elements of monopolization.

(1) Enjoyment of a right.

(2) Exclusion of others from this right.

c. Evils of monopoly.

(1) The price of the commodity raised.

(2) The commodity not so merchantable as before.

(3) The impoverishment of those excluded.

II. The Sherman Act. (Minor Premise.)

B. "What was the mischief and defect against which the common law did not provide?"

1. The absence of common law in the federal law.

a. All United States law derived from the constitution.

b. Lack of constitutional provisions in regard to restraint of trade.

C. "What remedy the Parliament hath resolved and appointed to cure the disease of the commenwealth." (Effects of the Act.)

1. The Act and its application.

a. Text of the Act.

b. To what is it applicable?

(1) Constitutionality of the Act.

(a) Power of Congress over interstate commerce.

(b) Power of Congress over corporations created by the States.

(2) What is interstate commerce?

(a) Actual transportation of commodities and persons between states.

(b) The instrumentalities and processes of such transportation.

(c) All negotiations and contracts which have for their object such transmission or passage from one state to another.

(3) Distinction between preparation for and participation in interstate commerce.

(a) Participation in interstate commerce, and ownership of stock in companies engaged therein.

c. History of the interpretation of the Act.

(1) The first period: the period of doubt. 1890-1897. (From the passing of the Act to the Trans-Missouri Freight Association case.)

(2) The second period: the period of rigid interpretation. 1897-1911. (From the Trans-Missouri Freight Association case to the Standard Oil case.)

(3) The third period: the period of liberal interpretation. 1911 to date. (From the Standard Oil case to date.)

(4) The economic effect of the shifting of the judicial point of view in regard to the Act.

2. Restraint of trade according to the cases.

(1) Period of interpretation as affecting decisions.

(2) Divisions of restraint of trade.

(a) General restraints of trade. These are bad.

(b) Partial restraints of trade.

a' In respect to time.

b' In respect to place. These are determined by reasonableness and the existence of a consideration to support the contract, but no line of reasonableness can be drawn. United States v. Trans-Missouri Freight Association , 53 Fed. 440.

(3) Restraint of trade made a misdemeanor. This goes a step beyond the common law because restraints of trade

were formerly unlawful merely, and werenot indictable except in certain cases such as the monopolization of necessaries. In re Green, 52 Fed. 104.

(4) Act and intent must concur. This is a criminal statute and accordingly the rule of the criminal law in regard to act and intent must be brought into it. In re Corning, 51 Fed. 205. This however is a rule of pleading rather than of positive law since the intent is deducible from the act.

(5) Distinction between restraint in staple commodities and in others.

(6) The rule of direct restraint.

(7) The rule of competition.

(8) The rule of reason.

(9) Intent under the act.

(10) Conspiracy under the act.

3. Monopoly according to the cases.

a. The meaning of monopolization.

b. The gist of monopolization.

(1) Necessity for combination and conspiracy.

(2) Necessity for a wrongful element.

c. Dangers of monopolization.

(1) The power to fix the price and injure the public.

(2) Enabling limitation on production.

(3) Danger of deterioration of monopolized article.

d. Attempts to monopolize.

D. "The true reason of the remedy." (Purpose of the Act.)

1. To provide a remedy against the trusts.

a. Tentative bills.

b. Passing of the Sherman Act.

2. To incorporate the common law into the statute law of the United States.

III. Conclusion.

By comparison of I and II it appears that the effect of the Sherman Act in regard to restraint of trade and monopolies is the same as that of the common law except in regard to remedy, which is essentially adjective and not substantive law.

Corollary.

It follows from the identity of the principles involved in the Sherman Act and the English Common Law that the "rule of reason" is the "reason" of the decided cases in England and the United States before the passage of the Act, and hence is definite and possible of exact determination.

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In Heydon's case, 3 Coke 7, the Barons of the Exchequer lay down the following rules: "For the sure and true interpretation of statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered; (1) A What was the common law before the making of the act? (2) B What was the mischief and defect against which the common law did not provide? (3) C What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) D The true reason of the remedy." It will be seen that the major premise of the syllogism is contained in (1), and the minor premise in (2), (3), and (4). The discussion accordingly falls under those heads.

I. The Common Law. (Major Premise.)

A. "What Was the Common Law Before the Making of the Act?"

I. Restraint of Trade.

Classification of Restraints of Trade. In the leading English case

of Mitchel v. Reynolds, 1 P. Wms. 181, decided in 1711, Parker C. J. carefully analyzed restraints of trade, considering them as voluntary or involuntary. The involuntary restraints are of historical importance only, since they rest in general on ancient custom and not on the contract relationship, which is essential in the modern application of the doctrine. The arrangement of voluntary restraints made by Justice Parker, however, is still recognized as fundamental in the law today. The classification is as follows:

1. Involuntary restraints.

   a. Grants or charters from the Crown.

      A new charter of incorporation to trade generally (in the city of London). This si void, as "no corporation made within time of memory can have such privilege (because of ancient custom) unless it be by Act of Parliament." 8 Co. 121.

      A grant to particular persons for the sole exercise of any known trade. This is void, because it is a monopoly and against the policy of the common law and Magna Charta. 11 Co. 84.

      A grant of the sole use of a newly invented art. This is good because it encourages ingenuity in the trades.

   b. Restraints by custom.

      Those which are for the benefit of some particular persons who are alleged to use a trade for the advantage of a community are good. 8 Co. 125. 2 Bulst. 195.

      Those which are for the benefit of a community of persons who are not alleged but are supposed to use the trade in order to exclude foreigners are good. 8 Co. 121 This

was abolished by St. 5 and 6 W. IV. c. 76 s. 14.

A custom may be good to restrain a trade in a particular place though none are ever supposed or alleged to use it.

c. Restraints of trade by by-laws.

Those excluding foreigners are good if merely to enforce a precedent custom by penalty. 1 Roll. Abr. 364.

All by-laws made to cramp trade in general are void.

By-laws made to restrain trade for the better government and regulation of it are good, if they are for the benefit of the place; to avoid public inconvenience, etc.; and are for the advantage of the trade. Raym. 288.

2. Voluntary Restraints.

a. General restraints. These are all void, whether by bond, with or without consideration, and whether it be the party's own trade or not, which is restrained.

b. Particular restraints.

If without consideration, even these restraints are void.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good.

Perhaps a more useful classification of voluntary restraints is the following:

2. Voluntary Restraints.

a. Trade of one of the parties restrained.

If limited in regard to the time or place, such a contract is good.

If unlimited in regard to time or place, however, it is always bad.

b. Trade of another restrained, i. e., a contract to restrain, not in restraint of trade.

If the parties have no business of their own of that nature, the contract is bad, as the justification of promoting another trade is wanting, and it is done maliciously.

If the natural and expected result is to restrain another's trade, but for the benefit of their own, and by lawful means, the contract is good, as it promotes one trade as much as it injures another.

If unlawful means are used, the contract is always bad.

Restraint of Trade Founded on Public Policy. The law of restraint of trade is in every case that of public policy. In this regard, Kekewich J. said in the case of Davies v. Davies, 3 Ch. Div. 359: "All authorities from first to last, concur in one thing,--viz. that the doctrine on this subject is founded on public policy, and I cannot but regard the jarring opinions as exemplifying the well-known doctrine of Mr. Justice Burrough in Richardson v. Mellesh, 2 Bing. 229, that public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you. Public policy does not admit of definition, and is not easily explained." --- "One thing I take to be clear, and it is this --- that public policy is a variable quantity, that it must vary, and does vary with the habits, capacities and opportunities of the public."

It was inevitable that as time went on, the judicial attitude toward restraints of trade should shift. The early policy of England was to encourage trade by every means, artificial or natural, and thus to build up a nation of traders. To gain this end in early times, any restraint whatever was frowned upon; and no departure from the

rigorous rule that contracts in restraint of trade were void, was countenanced. In the course of the industrial and economic development of the country, however, a more liberal view was adopted, since the courts began to look differently at the question: "What contracts restrain trade?" When the avenues of trade and employment were impeded by artificial policies, so that no occupation was open to the workman except his trade, any agreement restraining that trade made him useless to the community, but with greater freedom of the individual came the idea that all such contracts were not necessarily injurious. Schrainka v. Scharringhausen. When the original doctrine was evolved, means of communication were scanty and the economic life of the obligor was restricted to his own community. With the invention of the railway, the telegraph, and the telephone, the possibilities of economic efficiency increased to a remarkable degree, and where the individual as an industrial unit had formerly been confined to one locality, he now might exercise a nationwide influence upon the business of the country. Under these conditions, public policy must necessarily be a variable quantity, since a state in an agricultural or trading era must have different needs when it reaches a manufacturing or industrial stage of development.

Objections to Restraint of Trade. In Mitchel v. Reynolds, supra, four reasons were given by Parker C. J. why contracts in restraint of trade were contrary to public policy and presumed to be bad: 1. In favor of trade and industry. 2. Because mischief plainly appears, but the benefit, if any, can only be presumed, and in that case the presumptive benefit is overcome by apparent mischief. 3. Because the mischief is not only private, but public. 4. It is presumably of no benefit to the obligee himself because on account of the general in-

jury to the public, every one is affected thereby.

In an early Massachusetts case, Alger v. Thatcher, 19 Pick. 51, such contracts were considered injurious to the parties making them, "because they diminish their means of procuring livelihood-- or competency for their families; they tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisition, and they expose such persons to impositions and oppression; they tend to deprive the public of the services of men in the employments and capacities, in which they may be most useful to the community as well as to themselves; they discourage industry and enterprise, and diminish the product of ingenuity and skill; they prevent competition and enhance prices; they expose the public to all the evils of monopoly. All this is especially applicable to wealthy companies and large corporations which have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like this, wise laws protect individuals and the public by declaring all such contracts void."

The light in which the state regards contracts in restraint of trade was succinctly stated in the case of Oregon Steam Navigation Co., v. Winsor, 20 Wall. 64. There the court said that contracts in restraint of trade are bad for two reasons: first, the public is deprived of the industry of the restricted parties and therefore suffered injury; secondly, the party himself is injured by being precluded from pursuing his occupation, and thus supporting himself and his family.

Historical Development of Restraints of Trade. It was decided as early as the reign of Henry V that a contract imposing a general restraint of trade is void. Hull J. is said to have flown into a passion at the very sight of a bond containing such a condition and to have said: "A ma intent vous poures aver demurre sur luy que l'obligation est vôide eo que le condition est encounter le commen luy, et per Dieu, si le plaintiff fuit icy, il irra al prison tanque il ust fait fine au Roy." 2 Hen. V. fo. 5, pl. 26. For the next few centuries restraints were considered general if unlimited either in regard to time or place. Furthermore, the consideration was strictly examined during this period and the rule was followed that it must be adequate to the restraint. This was of course difficult of determination and gave rise to conflicting decisions, since any such question of adequacy must necessarily be dependent upon the economic and social opinions of the presiding justice. So strict was the rule in favor of the freedom of trade and contract that all contracts were presumed to be bad until something further appeared in favor of the obligee than the mere fact that the restraint was partial. In order to overcome this presumption, the entire circumstances of the case were to be examined, and judgment was given on the then indefinite test of reasonableness, as applied to these circumstances.

Such was the state of the English common law at the time of the American Revolution. Since then, however, the changing economic conditions have resulted in far-reaching modifications of the original doctrine. In 1837, Hitchcock v. Coker, 6 A & E 434, did away with the rule demanding inquiry into the sufficiency of the consideration. Since that case was decided there has been nothing peculiar to con-

tracts in restraint of trade in regard to requirements of consideration; the rules of other contracts apply, and a consideration such as would be binding upon the parties in an ordinary contract, is sufficient so long as it is not colorable merely. At about this time it became definitely settled that if a covenant is in any way limited, either sufficiently as regards space, or as regards time, then it will not be considered as an absolute restraint of trade, but only as a limited restraint, where the question of the reasonableness of the limitation becomes pertinent. Davies v. Davies 3 Ch. Div. 359. In 1843, Mallan v. May, 11 M & W 653, the rule in regard to the presumption that all contracts in restraint of trade are bad, was still held to be the same as in Mitchel v. Reynolds. This rule gradually changed, however, in the next few decades, and in 1887 Cotton L. J. said of it in Davies v. Davies: "That I think has been modified to this extent, that the presumption is not that such a covenant is bad, but it is rather for the court to consider whether on the facts it is or is not bad."

The present English doctrine as to limitation of time or space is as follows: When the restraint is general, i. e. without qualification, the contract is held eo ipso unreasonable and contrary to public policy. When it is partial, i. e. subject to some qualification either as to time or space, then its reasonableness must be considered. In this question, attention is especially paid to the limits of time and space set forth, and the protection of the trade of the covenantee, this latter point involving not only the nature and extent of the trade but including the application of improved facilities in means of transportation and communication.

It has been said that the American doctrine in regard to restraint of trade as embodied in the common law of the states has changed little from the original English common law at the time of the adoption of the Constitution. This is not justifiable in recent years, though it may be that the law in this country has not been modified so much as in England. It was undoubtedly true until the decades immediately following the Civil War, and it must have been true in the order of things, because the United States had not yet reached that stage of industrial development which was instrumental in bringing about the change in the law of England. Since 1870, however, the enormous increase in facilities of all kinds has changed the economic life of this country much as that of England had been changed a short time before, and with this rapid development came an equally rapid modification of public policy as applied to restraints of trade. Hence it is better to say that the American common law changed later than the English common law, but that by 1890 they were approximately the same.

Modern Requisites of Valid Restraints. 1. The contract must be partial. As long as some limitation either as to time or place appears the rule against general restraints is satisfied. The contract may be divisible, being valid as to one part and invalid as to another, under this rule. For example, in the case of the covenant not to carry on the business of brewer in S or elsewhere, for a period of ten years, it was held that the condition might be good as to S, but was bad as to the rest. Hinde v. Grey 1M & Gr. 195.

2. The consideration must be adequate. At present, adequacy of consideration is determined by the point of view of the parties, and

the same rules of consideration apply as in other cases in the law of contracts.

3. The restraint must be reasonable. Tindal C. J. in Horner v. Graves, 7 Bing. 724 says: "We do not see how a better test can be applied to the question, whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the parties require, can be of no benefit to them, it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." It appears then, that three elements enter into the question of reasonableness: first, injury to the party restrained; secondly, injury to the public; thirdly, use to the obligee.

American Cases on Restraints of Trade. In the case of a contract not to sell mattresses in the state of New York west of Albany, it was held that this was too large a territory, as not being necessary to the reasonable protection of the plaintiff. Lawrence v. Ridder, 10 Barb. 641.

The state is in any case too large a territory. Peltz v. Eichell 62 Mo. 171. Dean v. Emerson 102 Mass. 480.

This rule is one of reason, however, and not of place, and must accordingly be applied with care. Oregon Steam Navigation Co. v. Winsor.

Contracts including a town and other territory are divisible in the United States as well as in England. Peltz v. Eichell supra.

The rules in regard to restraints of trade never extend to a

business protected by a patent. Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 73.

The following restraints have been held to be valid:

Not to sell liquor on certain premises in quantities less than five gallons, Sulton v. Head. 86 Ky. 156.

Not to manufacture ochre in certain county. Smith's Appeal, 113 Pa. St. 579.

Not to carry on a trading business on certain premises. Morris v. Mf. Co. 83 Ala. 565.

Not to sell sand from certain premises. Hodge v. Sloan 107 N. Y. 244.

Not to sell a particular line of goods in a certain town. Clark v. Crosby 37 Vt. 188.

Not to sell to any in a certain town except to the promisee. Newell v. Meyendorf 9 Mont. 254.

1. Monopolies.

Classification of Monopolies. Strictly speaking, monopolies at common law were in every case dependent upon a grant from the sovereign. In later times, however, both in England and the United States, the term monopoly was expanded to cover combinations and other operations resulting in suppression of competition; and the necessity for a franchise gradually disappeared in the customary application of the term. Accordingly, in any modern enumeration of the current types of monopoly, not only must the historically accurate classification of monopolies by franchise be given, but present-day industrial combinations as well.

1. Monopolies by franchise.

a. Mediaeval franchises. These accompanied the Manor system---frankfold and park, warren and piscary, smithy and bakehouse, mill and market. Fitzwalters Case, 3 Keb. 242. In the towns, the trading and craft guilds were also monopolies of this sort. Freemantle v. Silk Throwsters, 1 Lev. 229.

b. Patents of monopoly. These were originally instituted towards the end of the sixteenth century as a method of encouraging new enterprises and large industries, but soon began to be felt as a great burden, when the ordinary trades and commodities were granted in this way as rewards to court favorites. Case of Monopolies, 11 Coke 84 b.

c. Modern franchises. The test of the validity of the franchise in modern times is the safety or interest of the public. Thus the followint purposes uniformally justify the creation of grants of this sort by legislative bodies:

Public health.

Cleaning of streets, etc. In re Vandine 6 Pick. 187.

Slaughtering of animals. Boyd v. Montgomery 117 Ala. 677.

Public safety.

Sale of liquor. Lowenstein v. Evans 69 Fed. 908.

Fiduciary businesses. People v. San Francisco 100 Cal.605.

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Public institutions.

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Regrating. This consisted of buying necessaries after they were in the market, with intent to sell them in the same market at an advanced price, or even of contracting for the delivery of goods in advance of the market, with like intent. Rex v. Rusby 2 Peake N. P. 189.

Engrossing the market. The buying of necessaries at markets or elsewhere with intent to sell again, and especially much buying of this sort with such intent constituted the offence. Rex v. Maynard, Cero. Car 231.

Conspiracies against trade. From earliest times, if several combined to control trade or advance prices, it was a serious offence whether actual injury resulted or not. Anon. 12 Mod. 248.

b. Modern forms of monopolization. At the present time industrial combinations for the purpose of suppressing competition are usually effected by one of these devices:

Pools. Swift v. United States, 196 U. S. 375.

License or lease. Oliver v. Gilmore, 52 Fed. 562.

Trusts or similar devices. Gould v. Head, 38 Fed. 886.

Holding corporations. Northern Securities Co. v. United States 193 U. S. 197.

Consolidating corporations. McCutcheon v. Weiz Capsule Co. 71 Fed. 787, Contra, Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507.

Public Policy in Monopolies. In many respects the same reasons hold for the abolition of monopolies, as apply in the case of restraints of trade. As distinguished from restraints of trade, however, it is the public alone who suffer on account of the rise of prices, deterioration of the article, exclusion of the public at large, together with limitation of production, which monopoly necessarily implies. On account of this connotation, there has been for several centuries in the Anglo-Saxon mind a repugnance for monopolies as a relic of the times when franchises were promiscuously given as perquisites of courtiers. In

the words of Justice Story: "When it is once suggested that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice which grew up in former times from the gross abuses of the royal prerogatives, to which in America there are no analogous authorities."

"All grants of this kind relating to any known trade are made void by the common law, as being against the freedom of trade, discouraging labour and industry, restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity, all of which are manifest inconveniences to the public." Hawkes P. C. c. 79, P 2. Those guilty of monopolizing at common law were subject to fine and imprisonment, the offence being considered malum in se, and "contrary to the ancient and fundamental laws of the kingdom." 3 Inst. 181.

The fundamental idea of the common law of monopoly is found in the Case of Monopolies, 11 Co. 84 b. The question of a grant of the exclusive privilege of making playing cards within the limits of the kingdom being in issue, it was held a monopoly and against the common law for four reasons: (1) All trades by which men maintain themselves and increase their substance are profitable for the common welfare, and therefore the grant of an exclusive privilege in one of them is against the common law inasmuch as it is a restriction of liberty. (2) A monopoly is a prejudice to all subjects, for there are three inseparable incidents to every monopoly: (a) the price of the commodity will be raised, (b) the commodity will not be so good and mer-

chantable as before; (c) it tends to the impoverishment of those excluded. (3) The queen was deceived in her grant, for the grant recites that it was for the public weal. (4) The grant was prima impressionis without authority of law or reason. It will be noticed that the arguments upon which most stress is laid today are under (2): the price is raised, the commodity is likely to deteriorate, and the monopoly is likely to cause hardship to those having no interest in it.

History of Monopolies. The unpopularity of monopolies is not peculiar to English law. The objections to it rest on underlying principles maintained for the encouragement of trade and commerce, which have been favored by all peoples. In Greece, by the laws of Athens, the practice of exporting corn or even of secreting or hording it up was punishable by death. Lypsiae contra Dardanarios orationem, Among the Romans offences against trade were classed as extraordinary crimes against which no special law was enacted, yet which as offences against the republic were punishable in the discretion of the magistrates, even by death: raising the prices of provisions, and selling by false weights and measures, were especially condemned. By the Julian law, whoever conspired to raise the price of vituals, such as corn, oil, bread, meat, salt, etc., whether by detention of vessels, subtraction or suppression of provisions, or by other similar malpractices was severely fined. All fraudulent acts of the Praefecti Annonae, the magistrates who had in charge the regulation of provisions, were punishable under this statute. Eden. elementa juris civilis, p. 796. Among the Swedes and Goths, no purchase could take place except before witnesses, and this not merely to insure evidence of the transaction, but in order that the purchaser should be able to buy the commodity at

a reasonable sum. Stiernh. de iure Suec. et Gotho vestusto. c. 5.

Many regulations were in effect among the Saxons in England, and after them under the Anglo, Danish, and Norman kings, all for the purpose of obtaining free and open traffic. From the times of Lothario and Edric, kings of Kent, and Ina, king of Wessex, to the period of the Conquest, scarce a reign elapsed without some enactment for these purposes. Throughout the greater part of this period, it was the law that no person should buy, sell, bargain for, or exchange any cattle, cloth or other commodity, except in the public market, in the most frequented and open part, and before witnesses with surety and warranty. By the laws of Ethelstan all sales of articles above the value of 20 pence had to be made publicly; under those of Canute, all above 4 pence; and under the regulations of Aethelred the purchasers of cattle or sheep were obliged to preserve the head and hide for three days before they sold them. These laws were enacted not only to promote publicity and suppress fraud, but in accordance with a well-defined policy which declared that fairs and markets should be replenished and furnished with all sorts of commodities.

This policy was continued in later times and numerous statutes* were enacted by the Plantagenets and Tudors for the purpose of fostering trade and commerce. Among these statutes two are especially prominent: 2 & 3 Edw. VI. c. 15 summarized and collected previous statutes

*cf. 23 Edw. III, c 6; 6 Rich. II, c 10; 11 Rich. II, c 7; 1 Hen. IV, c 13; 14 Hen. VI, c 6; 25 Hen. VIII, c 2; 2 &3 Edw. VI, c 21; 5 & 6 Edw. VI, c 14; 5 Eliz. c 5 & 12; 13 Eliz. c 13; 21 Ja. I, c 22; 2 & 3 P & M, c 13; 31 Geo. II, c 40.

on the subject to the effect that combinations among victuallers or artificers to raise the price of provisions or the rates of wages were unlawful. Punishment was by fine and imprisonment for the first offence, fine and the pillory for the second, and fine and loss of an ear for the third. The Statute of Monopolies 21 Ja. I c. 3, by a general clause demolished all existing monopolies, with certain exceptions, and declared them to be contrary to the law and void. Among the exceptions were included all grants under acts of Parliament, patents granted for a limited time, monopolies as to printing, and as to certain manufactures and materials useful in war.

All these statutes were repealed by 12 Geo. III. c. 71. After this time however monopolies were still prosecuted at common law until 1844 when 7 & 8 Vic. c. 24, declared that this entire body of law had been done away with, thus marking a new stage in the industrial development of England. Practically all that is now left of this part of the common law is the law against "corners", i. e., securing such control of the immdeiate supply of any product as to enable those operating the "corner" to advance the price of the product arbitrarily. Ex parte Young, 6 Biss. 54. The gist of this offence, however, is in the conspiracy involved; the individual may control as much of the market as he is able unless it is done by unlawful means, as by gambling contracts. Rex v. Hilbers, 2 Chitty 163.

Elements of Monopoly. The elements of monopolies at common law are these:

1. A grant, commission, or franchise from the sovereign authority.

2. A certain, definite grantee who may be a person or persons or a corporation.

3. An exclusive privilege, usually the sole buying, sell-

ing, making, working or using of something.

4. The public in general is restrained from some freedom or liberty enjoyed before; that is, restrained from following trades, pursuits or callings there-to-fore free and open to all.

From this enumeration of the elements of a monopoly, it appears that only common law monopolies have the necessary characteristics to permit analysis into these parts. Under this type of monopoly there are in the United States only patents, and grants from legislative bodies for public and quasi-public purposes. All other so-called monopolies are more nearly analagous to restraints of trade. As the modern idea of monopoly, however, is so deeply rooted in the lay as well as the legal mind, it is necessary to define it in terms other than those historically accurate. While at present there is much opinion and some authority for the proposition that magnitude alone is able to constitute monopoly, the prevalent definition includes suppression of competition by unification of interests or management, or through agreement and concert of action. In the Tobacco Case, 164 Fed. 700, the court said that a monopoly in its present sense exists when as a result of efforts to that end, previously competing businesses are so centered in the hands of a single person or corporation, or a few persons and corporations acting together, that they have power practically to control the prices of commodities and thus practically to suppress competition. Careful examination of the apparently conflicting opinions as to the present status and constitution of a monopoly, however, seem to lead to this conclusion: that the elements of common law monopolies are still present, with the exception of the first, namely, the grant or franchise from the sovereign, which has

disappeared in the course of shifting economic conditions. With the exception of this requisite, modern forms of monopoly so far as can be determined from the adjudged cases, have in every case the two fundamental elements emphasized at common law. There is in every case an exclusive right or privilege on the one hand and an exclusion from certain existing benefits on the other. It will be seen in the analysis of any monopoly in the modern sense, that this distinction holds true: the industrial organism constituting a monopoly secures the exclusive privilege by means of suppression of competition and other devices; at the same time it excludes the ordinary individual from the privileges which it enjoys. The test of competition so often promulgated is found under this definition to be secondary only. Suppression of competition amounts to no more than a means whereby a certain result, namely, the enjoyment of an exclusive privilege, is attained. Hence, it is, that the emphasis should not be on the suppression of competition, but on that which suppression of competition generally implies, namely, the exclusive privilege.

II. The Sherman Act. (Minor Premise.)

B. "What was the mischief and defect against which the common law did not provide?"

Absence of Common Law in Federal Law. At the time of the adoption of the Constitution the common alw recognized on this side of the Atlantic was the common law of England together with the precedents which had grown up in the colonies. It was therefore a common law of the separate states and was often quite different in one from what it was in another, owing to the fact that even at that early period the English common law had been modified in the various colonies to suit their particular needs. There was, then, no one body of unwritten law which, at the time the Federal government was established, passed in its entirety from the colonies as a whole to the nation. Each individual state retained its own distinct corpus juris, granting and delegating to the national government certain definite powers which were enumerated in the Constitution. These grants of powers were specific. No wider application of them was or is permissible than is necessary in order to secure their proper administration. Unless the power therefore is specified in the Constitution there can be no question of the ability of the federal government to interfere. The situation amounts to this: The Unitest States as a distinct sovereignty has no common law of its own. In any given case, unless Congress in pursuance of a power granted to it under the Constitution, has made provision for the subject-matter at bar, by general or particular legislation, it must be said that the United States as such has no law on the matter involved.

Most of the particular civil and criminal cases which may arise

under the jurisdiction of the United States, are enumerated in the Judiciary Acts of 1789 and the Crimes Act of April 30, 1790. U. S. Rev. St. Title LXX. Under these Acts and under others which extend their application, the common law of the United States is in civil cases the common law of the particular state from which the question comes to the federal court, (U. S. Rev. St. Sec. 721), but even in such cases the United States has no unwritten civil law as an original jurisdiction, since the law is made for it according to the individual case arising under the individual State common law. In criminal cases, there is no common law of the United States whatever, since the criminal law of the states is not recognized as affecting federal offences. Swift et al. v. R. R. Co. 64 Fed. 59. U.S. v. Worrall 2 Dall. 384. The subject of restraints of trade and monopolies was not mentioned in the Crimes Act, nor in any subsequent act until the Sherman Act of July 2, 1890. Accordingly there was no criminal law in this regard in the United States until the passage of the Act; and the institution of civil suits by the government against monopolies was not practicable because no one body of law was available. Although the question has never arisen, it is probable that under its power to regulate trade and commerce the United States might have interfered in a civil case where a monopoly or restraint of trade was involved, and have controlled the offending company to some extent by empolying the law of the states in which the monopoly or restraint was conducted, yet in any case such control must necessarily have been incidental only, since if the question were raised for its own sake, there was until the Sherman Act was passed no effective remedy which could be applied, even if

the suit was successfully prosecuted. The Sherman A ct, then, made it possible for the United States to institute proceedings against trusts and monopolies as it had heretofore not been able to do.

Conditions requiring Legislation as to Restraints and Monopolies.

There was no mention of the subject in the Judiciary Acts nor in the Crimes Act for the simple reason that a condition of affairs which would necessitate control of trusts and monopolies was not contemplated. At the time of this legislation, the United States was as yet in the agricultural and trading stage of development. Business enterprises were conducted by individuals, and the partnership was the most complicated form of industrial combination then existing. It was not until approximately a half century later that this country can be said to have become far advanced in the manufacturing stage and even then business combinations were unknown. In the years following the Civil War, particularly in the '70's and '80's, remarkable progress took place in the evolution of our industrial development. During this period, railroads were built with extraordinary rapidity, means of communication were greatly improved, and the business horizon of the manufacturer was widely extended. It was inevitable that with this broadening of the range of efficiency in marketing as well as in production, large enterprises should tend to grow larger still and leaders of industry should combine with others to control prices and markets. In the latter part of the '80's the spirit of combination had increased to such a degree that it was evident that governmental interference was necessary in order to p rotect the small producer and the public. The first legislation along this line was the Interstate Commerce Act of 1887. This was directed against the then

prevalent practices of railroads, whereby discrimination became the rule and fair competition the exception. More legislation, however, was necessary. The railroads were not the only factors in the change in economic conditions that was gradually being forced by the "Captains of Industry". Monopolization had begun to be the predominant characteristic in the production of staple commodities, and it was evident that national ideals of fair play and opportunity for the individual could be preserved only by governmental interference. To this end the Sherman Act was passed, operating in effect as a supplement to the Interstate Commerce Act. It strengthened the hold of the government on the railroads, which had been the especial object of the earlier Act, and going beyond it, struck directly at the vast combinations which were then operating to control production, suppress competition, and fix market prices. It was in effect a drag-net to include all monopolies and combinations which might escape existing legislation.

C. "What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth." (Effects of the Act.)

1. The Act and its application.

Text of theSherman Act. Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or th District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by

like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Constitutionality of the Act. The power of Congress to deal with the question of restraint and monopolization of interstate commerce rests on Article 1, Sec. 8 of the Constitution, "The Congress shall have power --- to regulate Commerce with various Nations and among the several States, and with the Indian Tribes". Any action that Congress may take on this subject is necessarily dependent on this clause; otherwise ther would be a conflict of jurisdiction between Federal and State governments. In discussing the application of the Act, the question of the proper sphere of control of the two units of government is of prime importance, for not only is the power of Congress over interstate commerce in issue, but also its authority over state created corporations.

The question of the constitutionality of the Act was first raised in the Supreme Court in U. S. v. Joint Traffic Association, 171 U. S. 505, where it was contended: That contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society. That Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the Act in question. That it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of the opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. That the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment to the effect that no person shall be deprived of life liberty or property without due process of law, secure to all persons freedom in the pursuit of their vocations, in the use of their property, and in making such contracts or arrangements as may be necessary therefor. Counsel further urged that ordinary contracts and combinations, which are at the same time most indispensible, have the effect of somewhat restraining trade and commerce, although to a very slight extent, and under the construction adopted, must be considered illegal.

Disposing of the last point first, the court held that these ordinary contracts do not restrain commerce or trade within any legal definition of the term, quoting Hopkins,v. the United States, 171 U.S. 578: "The statute applies only to those contracts whose direct and

immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only."

Congress has the power with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, to say that no contract or combination shall be legal which restrains trade and commerce by shutting out the operation of the general law of competition. "The business of a railroad carrier is of a public nature, and in performing it, the carrier is also performing to a certain extent a function of the government, which, as the counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between states such commerce becomes what is described as interstate commerce, and comes to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several states." Though the franchise is the property of the grantee, Congress may regulate the exercise of such grants within certain limits, extending at least to the prohibition of contracts relating to interstate commerce which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. Ordinary freedom of contract in the use and management of their property does not require the right to combine as one consolidated, powerful association, eliminating com-

petition and maintaining higher rates. "The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of this principle, the courts might be applied to for relief." The power is properly exercised until the limitations and guarantees of the constitution are violated. A citizen has not the right to pursue any livelihood or vocation , but only lawful ones, and Congress has the power to restrain him from making contracts on certain subjects and in certain circumstandes. Fusbie v. U. S. 157 U. S. 160. The power accordingly exists in Congress to pass this statute and its validity cannot be questioned.

The constitutionality of the Sherman Act was next discussed in the case of Addyston Pipe and Steel Co. v. U. S. , 175 U. S. 211. Here it was urged that the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by regulations made under its authority by some political subdivision of the state, including also congressional power over common carriers, elevator, gas and water companies, for reasons peculiar to such companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded on the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation,and to prevent the possibility of conflicting and discriminating state legislation, together with the further

claim that the constitution guarantees liberty of private contract to the citizen, at least upon commercial subjects, and to that extent the guarantee operates as a limitation on the power of Congress to regulate commerce.

The court held, however, that the reasons which may have caused the framers of the constitution to repose the power to regulate interstate commerce in Congress, do not affect or limit the extent of the power itself. Under the constitutional grant of power to Congress, "that body --- may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce (including foreign commerce)." The court also refused to assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is full and complete in Congress. There is no limitation excluding private contracts, and it does not come under the clause relating to life, liberty and property. Liberty, under the decision in Allgeyer v. La., 165 U. S. 578, includes the right to enter into certain classes of business, but it has never been held, and properly so, that the word includes "the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, (among other things) of the fact that they would, if performed , result in the

regulation of interstate commerce, and in the violation of an act of Congress upon that subject. The provision in the Constitution does not --- exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States. The scope of the language of the constitution must not be enlarged to such an extent."

If private contracts can restrain interstate commerce, why should not Congress reach them in that power, just as well as it concededly might reach them if their conditions were embodied in some state statute? Both are under the control of Congress. Liberty of contract in such a case would be giving sovereign powers to the subject, which properly belong to Congress. "Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even tho such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the state itself." Congress has jurisdiction in one case as much as in the other.

The states have exclusive jurisdiction over various matters, resulting in different laws, owing to the division of sovereignty..

"But upon the matter of interstate and foreign commerce and the proper regulation therof, the subject being not alone national but international in its character, the great importance of having but one source for the law which regulates that commerce throughout the length and breadth of the land cannot in our opinion be overestimated. Each state in that event would have complete jurisdiction over the commerce which was wholly within its borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts of the nature we have been discussing."

The defendants in this case relied to some extent on dicta in Railroad Co. v. Richmond, 19 Wall. 584, to the effect that it never was intended that the power of Congress should be exercised so as to interfere with private contracts not designed, at the time they were made, to create impediments to interstate commerce. To this the court replied: "There is no intimation in this remark that Congress has no power to legislate regarding those contracts which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them"---"The fact of a direct and substantial regualtion is the important part of the contract, and that regulation existing, it is unimportant that it was not so designed.--Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid, and not touched by the act of Congress."

The question was again raised in the case of the Northern Securities Co. v. U. S. 193 U. S. 197; this time from the standpoint that as the Company was a state corporation and as it s acquisition of the stock of the Great Northern and Northern Pacific Railway Companies was not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress as against those corporations would be an unauthorized interference by the national government with the internal commerce of the States creating those corporations.

The defendants laid considerable stress on the claim that whatever may be the power of a State over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce, since the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, is a matter in respect of which Congress has no authority under the Constitution. It was held unnecessary in this case to consider such abstract, general questions. "The government does not contend that the acquisition and ownership of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. What it does contend is that the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them, is illegal. Independently of any question of the mere ownership of stock or the organization of a state corporation, can it in reason be said that

such a combination is not embraced by the very terms of the Anti-Trust Act?"

The court quoted Marshall C. J. in Gibbons v. Ogden, 9 Wh. 1, who laid down the rule that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the rule by which commerce is to be governed", that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if as has always been understood, the sovereignty of Congress though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of t e power as are found in the Constitution of the United States."

"The rule for international and interstate commerce, adopted in this case was that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. The question is, whether Congress has power to adopt this rule, and not as to the economic wisdom thereof. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws and not of men."

The defense attempted to argue that the act was unconstitutional under the Tenth Amendment: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People," urging that any decree preventing the Northern Securities Company from exercising the power it had acquired, would be an invasion of the right of the States when exerting their power to create corporations. This the court declared was inconsistent with all previous decisions regarding the powers of the national government over matters committed to it. "No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exercising the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporations engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce," "Every corporation created by a State is necessarily subject to the supreme law of the land. The Federal court may not have the power to forfeit the charter or prohibit it from acquiring real estate, increasing its stock, etc., but it may prevent that company in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of trade. It would be extraordinary if the court in executing the act of Congress could not lay hands upon that company and prevent it from doing that which if done, will defeat the act of Congress." "In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce." All this can be done without infringing on the States, and no device or

evasion will avail to avoid the exercise of the federal power.

The contention of the defendants that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital and determine who may buy, own and sell the stock", was disposed of as being true but not meeting the controlling questions in the case. "So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind, domestic, interstate, and international, but neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for--- interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. --- We repeat that no State can endow any of its corporations, or any combination of its citizens with authority to restrain interstate or international commerce or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, its regulations

of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."

From an examination of the briefs of the various parties to litigation under the Sherman Act, who have attempted to urge the unconstitutionality of the statute, it appears that all serious efforts to declare it void have rested upon the Fifth Amendment. They are all built on the idea that interference by Congress in the industrial field is a violation of the rights of the citizen. But liberty of trade does not imply liberty on the part of a corporation or individuals to defy the national will, when legally expressed. Nor does enforcement of a legal enactment of Congress infringe, in any proper sense, the general, inherent right of everyone to acquire and hold property. That right, like all other rights, must be exercised in subordination to law.

Interstate Commerce. Congress has power over commerce among the states which"consists of intercourse and traffic, between their citizens and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities". This includes (1) the actual transportation of commodities and persons between states. (2) The instrumentalities and processes of such transportation. (3) All negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. It begins when transportation begins, and terminates when the mass of the property is in the other state. Delivery to a carrier indicates, as a general rule, the time of beginning of the interstate character of the commerce. Mere prepar ation for transportation is not sufficient. In re Greene, 52 Fed. 104.

Theoretically the control of Congress over commerce among the states is simple, and the essential factors in the determination of its jurisdiction are all included in the preceding paragraph. As a practical matter, however,it often becomes extremely difficult to fix the reason that the same article in the course of its progress from producer to consumer may be at one moment an element in the commerce of a state only, and the next an element of interstate or foreign commerce. In the case of actual transportation of commodities and persons between states little difficulty is experienced, since it is a pure matter of fact, involving no legal doctrines. When the question concerns instrumentalities and processes of transportation it is a matter of considerable nicety to decide what instrumentalities and processes are directly concerned with interstate traffic and what are

merely incidental to trade within the body of a state. Furthermore, the same difficulty arises in the case of negotiations and contracts affecting interstate commerce, since the same form of statement may at one time have an interstate significance and at another have an intrastate character only. Coming to specific instances, the distinctions to be observed are generally between the manufacture of an article in preparation for interstate business, and its actual injection into the current of interstate commerce; between negotiations and contracts for the sale or purchase of articles in other states, and mere facilities offered to expedite such transactions; between the control of factors in interstate commerce, and actual participation in that commerce itself.

The Distinction between Preparation for and Participation in Interstate Commerce. The point on which the decision turned in the E. C. Knight case, 156 U. S. 1, was the fact that the sugar combination at that time was engaged in the manufacture of sugar rather than in its sale among the several States. There Fuller C.J. said in this regard: "Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate commerce or trade. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." There was considerable doubt in the minds of some of the Supreme

Court, however, whether the fact that sale of the product in other States was contemplated, did not bring the combination at bar within the terms of the act. Harlan J. in his dissenting opinion argued from Gibbons v. Ogden that "those concerns which affect the States generally" are proper subjects of regulation under the Act and that this case presented an instance of interstate commerce in this proper sense. According to his interpretation of the Act, interstate commerce, embracing transportation, includes the purchase and sale of articles that are intended to be transported from one state to another: every species of commercial intercourse among the States and with foreign nations is within the purview of the Act.

The Addyston Pipe and Steel Case, 175 U. S. 211, was an instance of a contract in restraint of trade made by a combination within the body of a state, but operating to control commerce among the states. In that case it was said: "any combination among dealers of a commodity which has not yet passed from the state, which in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would be in our opinion one of restraint of trade or commerce among the States, even if the article to be transported and delivered in another State were still taxable at its place of manufacture." The control of Congress does not extend to the manufacture of goods which the producer may intend to sell in another state, as the sale is the direct result of the manufacture; the contract anticipating this sale however, does amount to a regulation. The Court was careful to state that Congress had not acquired any

jurisdiction over that part of the combination and agreement which related to commerce wholly within the State, by reason of the fact that it also covered commerce which was interstate. Accordingly, the right to combine in regard to a certain proposal for pipe deliverable in their own state could not be reached, and no judgment could be given by the court on that particular count.

Contracts affecting Interstate Commerce, and Facilities afforded it.

In U. S. v. Swift et al, 122 Fed. 528, and 196 U. S. 375, the defendants were packers who attempted to escape the operation of the Act by urging that they were not engaged in interstate commerce. Cattle were shipped from different states to the stock yards in Chicago, were there bought by the companies, converted into meat products, and shipped again to the consumers. The court refused to allow the contention of the defendants, considereing the underlying test to be that the transaction, as an entirety, including each part calculated to bring about the result contemplated, reached into two or more states, and that the parties dealing with reference thereto dealt from different states. An interstate commercial transaction, in the opinion of the court, is an affair rising in one state, centering in the act of exchange, and ultimately reaching a consumer in another state. Each essential part of the affair, is to be considered as much interstate commerce as is the center. The body of these transactions is regarded as two-fold: it reaches backward to the purchase of that which comes from one state and forward to the sale in another state. The purchase of cattle shipped habitually from other states in the expectation that the companies will buy, is interstate commerce. Commenting in the Supreme

Court on the interstate character of this traffic, Holmes J. Said: "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the States."

The obverse case was United States v. Hopkins et al, 82 Fed. 529 and 171 U. S. 577. The defendants were commission merchants at Kansas City engaged in the purchase and sale of cattle by means of an Exchange. In the lower courts the business was held to be interstate, largely on account of the fact that the trade was solicited in various states and loans were made upon the cattle before shipment. In the Supreme Court, however, the judgment was reversed on the ground that the association in reality offered facilities to interstate commerce but did not actually engage therein. The court intimated that all agreements which result in increased cost of interstate commerce do not fall within the Act; the result must be direct and immediate. Thus there may be a distinction between the solicitation of a drummer who secures the shipment of cattle, as in the Swift case, and the solicitation of an agent who urges shippers to make use of a facility offered to interstate commerce by such a combination as that involved in the Hopkins case.

Participation in interstate commerce and ownership of stock in companies engaged therein. The distinction was drawn by White J. in his dissenting opinion in the Northern Securities case, between participation in interstate commerce and mere ownership of stock in companies en-

gaged in such traffic. He says. The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce, which flows from the authority conferred by the Constitution, is conceded. But these concessions do not concern the question involved in this case, which is not as to the scope of the power of Congress to regulate commerce, but whether the power extends to the regulation of ownership of stock in railroads, which is not commerce at all. The power of Congress does not embrace the power to regulate the ownership of stock in state corporations, though such corporations be in part engaged in interstate commerce, under the definition of commerce in Gibbons v. Ogden. "Commerce undoubtedly is traffic, but it is something more, it is intercourse, that is, traffic between the States, and intercourse between the States." The ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. Commenting further on the definition in Gibbons v. Ogden and particularly on that part of it which declares that interstate commerce "describes the commercial intercourse between nations and parts of nations" Justice White asks: Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations"?

Justice White also considers that any construction allowing the view that Congress has the right to regulate the ownership of stock in companies chartered by state authority, is absolutely destructive of

the Tenth Amendment which provides that "The powers not delegated to the United States by the Constitution nor prohibited to it by the States, are reserved to the States respectively or to the People." This, he considers, follows from the fact that the authority of Congress to regulate on the subject can rest only on the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate business. The power to control the ownership of such railroads, would necessarily embrace their organization. Hence it would be in the power of Congress to abrogate every such railroad charter granted by the states, if Congress deemed that the rights offered by such state charters tended to restrain interstate commerce. Furthermore, this power would extend to the control of consolidating state railroads doing in part an interstate business, though expressly authorized by the states, and would overthrow every state law forbidding such consolidations, for Congress could permit, if it could forbid them.

The principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the states or create a monopoly thereof, is in Justice White's opinion in conflict with the most elementary conceptions of rights of property. For he believes it would follow, if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce, of more than a certain amount of property, would be prejudicial to interstate commerce, that the amount of property held or the amount which might be employed in interstate commerce, could be regulated.

The decision in the case rested on the fact that the consequences above pointed out were not involved, since the only issue was the right of the Northern Securities Co. to acquire and own the stock. The right of that company to do so, it was argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. To this proposition, Justice White refused to assent. He considered that if the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce, necessarily exists. That would also mean that a man might not do through a corporation that which he could do alone as an individual. Such a result would be anomalous, as the power to regulate includes interstate commerce of every description in like degree.

Application of the Act to Common Carriers. It was first seriously urged in the Trans-Missouri Freight Association Case that the Act does not apply to common carriers. It was there said: "The language of the Act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations." A contract that is in restraint of trade or commerce is by the strict language of the Act prohibited, even though between competing carriers by railroad, and even though it affects traffic rates only. If such an agreement restrains trade or commerce, it is prohibited; unless it can be said that an agreement, whatever its terms, relating to transportation, cannot restrain trade or commerce. There is no escape from the conclusion that if any agreement of such a nature does restrain it, it is condemned by the Act. Transportation is interstate commerce, and agreements between persons engaged in such business relate to commerce

and may restrain it. The terms of the Act do not bear out the construction urged by the defendants, namely, that it was intended to reach trusts only. The fact that Section 6, relating to forfeiture does not apply to railroads is no ground for arguing that the rest of the Act is not applicable.

It was urged that an agreement like the one in question was authorized by the Commerce Act, and that an interpretation of the Anti-Trust Act to include carriers carries with it a repeal of the Commerce Act. Further, if Congress had intended to affect railroads, it would have amended the Commerce Act in terms. But the Commerce Act does not authorize agreements of this sort. It may not prohibit, but it is far from authorizing them. The Sherman Act is a general statute, covering all interstate commerce, and attains results not to be gained by simple amendment of the Commerce Act. The two are not inconsistent.

The defendants attempted to put in evidence the debates in Congress which were held previous to the passing of the Sherman Act, in order to show that it was not contemplated that railroads should be subject to its provisions. The Court, however, held that debates in Congress were not appropriate sources of information to discover the meaning of the language of the statute, and insisted that the only proper source is the language of the Act and the history of the times. In the opinion of the Court these do not show that the Act was directed against trusts alone and they further show no intention on the part of Congress to consider railroads as economically and politically in a different situation from other combinations. The Sherman Act was general legislation aimed at combinations, monopolies

and contracts in restraint of trade, which are void regardless of their form; for the Act includes all interstate commerce, whether transportation, purchase or sale. It may at times be difficult to draw the precise line between those things which are comprehended by the term, and those which are not, but transportation is plainly included.

White J. dissented from this reasoning as follows: "The Interstate Commerce Act is a special act, and the Sherman Act is a general law. The rule that a general will not repeal a special statute if possible, should apply. Here the general act takes away the powers granted by the special act. It was not intended to hit the railroads when it was debated in Congress. The contract here made is directly sanctioned or impliedly authorized by the Interstate Commerce Act. When that act expressly forbids contracts and combinations between railroads for pooling, and makes no mention of other contracts, it is clear that the continued existence of such contracts was contemplated."

Of late years, however, the question has not been raised and it is now considered well settled that there can be no doubt of the intention of Congress to include combinations engaged in transportation, as well as industrial combinations. Contracts in restraint of trade and monopolies are prohibited by the Act; and the particular source from which they emanate does not affect their legal status.

Interpretation of the Act. In the Standard Oil Case 221 U. S. 1, Chief Justice White intimates that all the cases under the Sherman Act are reconcilable with the possible exception of the Trans-Missouri Freight Association Case and the Joint Traffic Association Case which, though correctly decided, are misleading in the statement of the law. It seems, however, that in spite of this dictum, three distinct periods of judicial interpretation of the Act are distinguishable. For a few years after the passage of the Act, ir was generally considered by the District and Circuit Courts that the statute merely incorporated the common law into United States law, though going beyond it in one or two respects. The Supreme Court in the Trans-Missouri Freight Association Case discountenanced this doctrine, however, and laid down the rule that all possible restraints of interstate commerce were unlawful. This decision was followed for several years, but was finally over-ruled as a matter of fact, regardless of intimations to the contrary in the Standard Oil and Tobacco Cases, where the court reverted to a rule approximately the same as that followed in the earlier decisions of the inferior courts. The course of interpretation by the courts can be traced as follows:

1. The first period: the period of doubt, 1890-1897 (from the passing of the Act to the decision in United States v. Trans-Missouri Freight Association, 166 U. S. 290). In this period the problem of interpretation of the Act was rpimarily for the District and Circuit Courts, which had no decision of the Supreme Court to guide their tulings. The general opinion among the jueges of the lower courts was that the statute was much like common law, and that no departure

from pre-existing law was contemplated except in so far as the wording of the Act made it necessary in a few particular instances.

Jackson, Cir. J. in re Greene, 52 Fed. 104, calls attention to the fact that in the consideration of the indictment at bar it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States are such, and only such, as are expressly designated by law; and that Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. 7 Cranch. 32; 1 Wh. 15; 108 U. S. 199. He reflects the general attitude of the courts at this period when he holds that it follows from these considerations that if Congress, under the exercise of powers conferred by the constitution, adopts or creates common-law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them. 2 Curt. 446. 4 Fed. 198. The Act of July 2, 1890, in declaring that contracts, combinations and conspiracies in restraint of trade and commerce between the states and foreign countries are not only illegal, but constitute criminal offenses, while in the main identical with the common law, goes a step beyond it in the punishment of contracts in restraint of trade, which, though unlawful, were not misdemeanors nor indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime, whereby contracts in restraint of trade are made misdemeanors, and indictable as such. But the Act does not undertake to define what constitutes a contract, combination, or conspiracy in

restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. The rule amounts to this: the status of combinations and conspiracies in restraint of trade is the same under the Act as at common law; contracts in restraint of trade become misdemeanors under the Act, whereas at common law they were unlawful merely.

The attitude of the court in the Trans-Missouri Freight Association Case when it was tried in the District Court, 53 Fed. 440, is particularly interesting, because in that case the Supreme Court decided on appeal, that the Act applies to all restraints of trade. Riner D. J. considered that the Act contemplated only those contracts which are publicly oppressive and whatever restrictions are broader than is necessary for the protection of the party to be benefited by the contract. In such a case the contract is unreasonable and void; otherwise it is not. Contracts having a direct tendency to prevent healthy competition are included, but those preventing unhealthy competition are not affected. The contract involved in this case he considered to be in the latter class, and accordingly not within the purview of the Act.

2. The second period: the period of rigid interpretation, 1897-1911, (from the Trans-Missouri Freight Association Case to the Standard Oil Case). The line of demarcation between the first and second periods is sharply drawn by the decision in the Trans-Missouri Freight Association Case. It had been held in the Circuit Court of Appeals that the Act does not apply to all contracts in restraint of trade, the court saying in so many words: "A contract that clearly restrains competition is not necessarily an illegal contract." This was now over-ruled, and the separate points upon which the previous doctrine was based were criticized. The contention was made in this case, as in most of the earlier cases, that the title indicates the inclusion of those contracts only which were unlawful at common law, on the theory that when terms known to the common law are used in a federal statute, those terms are to be given the same meaning that they received at common law. This proposition means that the use of the term "unlawful contracts" in the title of the Act indicates that the statute was intended to apply only to that class of contracts commonly known as Unlawful contracts", that is to say, to contracts held by the common law to be in unreasonable restraint of trade. It would then follow that the use of the words "every" and "all" in the body of the Act apply merely to such unreasonable contracts, and that, therefore, the Sherman Act is directed against every unlawful contract, rather than against every contract in restraint of trade, regardless of its status at common law. The court, however, declared that the language of the title refers to and includes those contracts made unlawful in the body of the Act. The term "unlawful contracts" in

the title accordingly has reference to contracts made unlawful by the statute itself and has no other connotation; the meaning of the title is to be determined exclusively by resort to the Act itself.

The court in this case also disposed of an argument commonly advanced in support of the theory that the Act applies only to unreasonable restraints, to wit, that "contract in restraint of trade" in its common law meaning includes unreasonable restraints only, and is used in this sense in the statute. Under the interpretation of the court, the term is not of such limited significance: it includes all kinds of contracts which in fact restrain, or may restrain, trade. Some are void and unenforceable at common law, because of the unreasonableness of the restraint, and some are valid because the contract is not against public policy, but there is no direct relationship between the validity of a contract and the degree to which trade is restrained under it. By the simple use of the term "contract in restraint of trade", all contracts of that nature, whether valid or otherwise, are included and the common law test of unreasonableness is of no moment. "When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language and no exception or limitation can be added, without placing in the act that which has been omitted by Congress."

In spite of the rigidity of this view of the Act, the court is nevertheless obliged to admit that certain classes of contracts, undoubtedly in restraint of trade, may not be included in the statute.

Such a case for example might be that a vendor of property who agrees with the vendee, that he will not enter the same business within a certain time or in a certain territory. While such contracts are in the opinion of the court reasonably necessary for the benefit of trade and commerce, notwithstanding their desirability, the Act can not be construed in their favor, without unjustifiably reading into the text an exception. The court believes that when once reasonableness is made the criterion, the inevitable personal bias of the presiding judge will interfere with the proper administration of the Act. Furthermore, the court asks, to whom would the rate be reasonable? Merely to the companies themselves!

In the Northern Securities Case it was stated that among the principles deducible from the cases decided under the Act, is this: that the Act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce. Brewer J. in his concurring opinion refused to accept this statement. He says that although the cases hitherto before the court had been rightly decided, the reasons given were in some respects wrong. "Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the Act. That Act, as appears from its title, was leveled at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of

decisions at common law had affirmed were reasonable and ought to be upheld." He insists that whenever a departure from common law rules and definitions is contemplated, the purpose to make the departure should be clearly shown; that such a purpose does not appear and such a departure was not intended.

In the Swift Co. Case the court followed the current doctrine that no consideration of reasonableness is presented under the Sherman Act, and attempted to formulate a test to determine the application of the Act. With this in view, it declared that whatever combination has the direct and necessary effect of restricting competition, is restraint of trade in the sense intended by Congress. This test may be considered the prevailing one during this period, although in some cases it was attempted to substitute the question whether the restraint at bar directly affected interstate commerce. Under this latter test, any restraint which directly and necessarily affected commerce between the states or with foreign nations was eo ipso within the statute.

3. The third period: the period of liberal interpretation, 1911 to date. (From the United States v. Standard Oil Co. 221 U. S. 1 to date.) The Standard Oil Case marks the departure of the Supreme Court from its previous adherence to the doctrine that each and every restraint of trade is within the Act and begins a new period of interpretation, in which the predominant question in any case is the inherent reasonableness of the restraint. The Court attempts to conceal the abruptness of the departure from the prevailing doctrine by endeavoring to reconcile all previously decided cases as far as possible, and by refusing to state in so many words that it has reverted to doctrines advanced by the lower courts immediately after the passage

of the Act. Nevertheless, on comparison of the rules of law laid down in the cases of the successive periods, it must be saind that the present attitude of the Supreme Court is practically that of the District and Circuit Courts of the first period, and that the rigid doctrines of the second period have been discarded once and for all. In spite of the assertions of Chief Justice White that all cases under the Act are reconcilable, with the possible exception of the Freight Cases, the old tests of direct restraint on competition or on interstate commerce, no longer have a controlling place in federal law.

In the Standard Oil Case, White C. J. considers at length the historical development of restraint of trade both in England and the United States, and concludes that the question of reasonableness is of importance for the following reasons:

The statute was drawn in the light of existing practical conceptions of the law of restraint of trade. This is so, because monopolies which in practice had come to be considered as in restraint of trade in the broad sense, are grouped with technical restraints and are included within the same class.

The language of the Act is made so all-embracing in order that no undue restraint should escape its application. The sweeping nature of the language contemplated the inclusion of every type of unlawful restraint of trade, rather than of every restraint as such.

As contracts are not expressly defined, freedom to contract is the essence of freedom from undue restraint on the right to contract. It follows that the contention that the statute includes all contracts in restraint of trade is unjustifiable, because every contract would be included, or if any distinction were made, it would be impossible to

frame accurate and definite criteria. Instead of the earlier tests, he states that the criteria for violations of the Act must be "the rule of reason guided by the established law and the plain duty to enforce the prohibitions of the Act". The two sections of the Act supplement each other and the test for each must be the same. It would seem to follow from this statement of the present test, that the "rule of reason guided by the established law" can be no other than the rule of the common law that restraints of trade are to be examined in the light of the comparative benefit to the parties and detriment to the public; and that monopolies are to be judged in accordance with the improper enjoyment of a right by one and the exclusion of the public from such enjoyment. This proposition is strengthened by the language of the court in United States v. American Tobacco Co., 221 U. S. 106, where the "rule of reason" is emphasized, and further stress is laid on pre-existing standards of the common law, although as yet the Court has refused to declare in terms that common law decisions are binding upon it in its interpretation of the statute.

In the Standard Oil Case, Harlan J. recognized the fact that the former rule of the Supreme Court in the Freight Association and Joint Traffic Cases was overthrown by the decision of the majority of the Court, and sharply criticized the departure. While concurring with the actual decision in the case, he dissented from the reasoning of the court on the ground that it is bound by the previous cases, and furthermore he objected to the proposed "rule of reason", because he anticipated as many "reasonable" theories as courts and juries.

Economic Effect of Changing Interpretations. The history of the interpretation of the Sherman Act is of prime importance in determin-

ing the value of the statute, and the necessity for its amendment or repeal. It has been argued by the opponents of the Act, that it has accomplished nothing for which it was intended; that is, has not benefited the trust situation in the United States, but has rather tended to complicate an already serious problem. On this account it is regularly proposed that a bill be substituted for it wherein every contract shall be described in terms so definite that there shall be no doubt whether the given case falls within the statute or not. Such a bill would certainly accomplish much, if it should bring about the intended result, but it seems highly improbable that this would be the case. Any attempt to bring broad and diverse matters of law within one statute, specifying in detail the particular instances to which such statute shall apply, necessarily implies a period of doubt and uncertainty before the final meaning of the law can be settled by the Supreme Court. However carefully the bill is drawn there must be in it certain words and phrases which must be judicially defined in their relation to the new legislation, before the business interests of the country can rely upon it and govern their conduct accordingly. Furthermore, it should be remembered that the Sherman Act has been interpreted in three different ways since enactment and that it is only within the last two years that it has been definitely settled that only unreasonable contracts are contemplated. The interpretation of the Sherman Act, then, has at last become definite and certain; but any new statute would have to passthrough an unsatisfactory period of construction such as that from which the Anti-Trust Act has just emerged. When the additional fact is taken into account, that any enumeration of particular instances to which a law

shall apply will probably prove unsatisfactory, the logical treatment of the matter requires that the existing Act should not be disturbed unless it is actually vicious either in its manner of interpretation or in the subject matter to which it applies.

Is the Sherman Act, then, vicious in either of these respects? As now interpreted, it rests on broad doctrines of the common law, tested by successive generations, and justified by the experience of the Anglo-Saxon race. Again, the present interpretation reflects the intent of the framers of the Act, and applies exactly to those classes of cases which Congress had in mind when the Act was passed. Henceforth it can never seriously be argued that absolutely every contract directly restraining interstate commerce is within the purview either of the language of the Act or of the legislative intention. The same principles which have guided English policy in regard to unlawful restraints and monopolies are now incorporated into the corpus iuris of the United States, and it may reasonably be expected that the same satisfactory results will occur in this country as have already taken place in England, when once sufficient time has elapsed after the new interpretation of the Act for the business interests to understand their position before the law and to enter into their contracts and combinations in accordance with it. Those contracts and combinations are prohibited, which are unreasonable; the "unreasonableness" is that of the common law; and the principles of the common law are definite and admit of no doubt as to their meaning. Since this is so, is it not better to build the business of the nation on these well-tested rules of law, rather than to force the manufacturer and the country to go through another period of doubt as to the meaning of a new

reformative statute?

Restraint of Trade under the Act. Any analysis of the criteria of the rules affecting contracts in restraint of trade, must be made with qualifications depending on the attitude of the Court towards the interpretation of the Sherman Act; that is to say, the period in which the given decision was made must be taken into account, and the weight of the decision will necessarily be modified thereby. For example, statements of judges in regard to rules concerning competition will be of greater authority, if made after the decision in the Standard Oil Case than if made during the preceeding period, when any direct restraint on competition among the states was supposedly the test of the application of the statute. To this proposition, the Supreme Court of the United States refuses to assent; yet it must nevertheless be true in large measure, since the gist of the Act has been considered to be one thing in one period and another thing in the next. During the first period, common law principles were regarded as important rules for the decisions under the Act; during the second period, the direct effect on interstate commerce, or the direct effect on competition in interstate commerce, was considered to be the rigid test whereby the given contract must stand or fall, and in the third period the court returned to the examination of the common law, as embodying the principles of the federal Act. The Supreme Court in the Standard Oil Case stated that in laying down the "rule of reason" it did not over-rule any of the preceeding cases, and it also attempted to reconcile them with the common law and with each other. This was rendered plausible by the theory that all cases at bottom rested on the rule that only unreasonable contracts were contemplated by the Act, but that in the given cases where no mention of this fact was made, the court decided

that the contract at bar was on its face so unreasonable as to preclude the necessity for discussion of this point. This statement of the Supreme Court, however, must be regarded as an attempt to soften the abruptness of its departure from the prevailing doctrine rather than as a declaration of the actual law. The decisions in the earlier cases thus attempted to be reconciled, flatly lay down the rule that the Sherman Act is absolutely independent of any question of reasonableness in the restraint of trade, and the wording of those decisions is generally entirely inconsistent with any latent idea in the mind of the court that the "rule of reason" played any part in the determination of liability. The Supreme Court itself was forced to recognize this fact in some of the more important cases, notably those of the Freight Association and the Joint Traffic Association, and stated th at these were valid only in so far as they decided that no discussion of reason in the c ntracts before them was necessary, since the contract was obviously within the statute.

While this attempt at reconciliation was undoubted ly praiseworthy in order that the unity of the law might not be disrupted, it nevertheless introduces difficulties into the present interpretation. Were it not for this justification of preceeding cases, the judgment in the Standard Oil Case would amount to a decision that the Sherman Act is simply an incorporation of the common law into the statute law, with a few modifications to be expected from the form of remedy adopted, and from the then existing state of public policy. But it follows from the approval of preceeding cases, that the various inconsistent statements in them must be regarded more or less as authoritative, except in so far as they directly deny the rule of reasonable construction. This means that for some time to come the various rules of competition

and direct restraint will be cited as of some authority, in the cases before the courts, and it is to be expected that some time must elapse before they are finally eliminated. Nevertheless, it is true that there is an appreciably increasing tendency to argue cases on their common law merits, and it is reasonably to be anticipated that in the near future, the entire logomachy of rules of competition and direct restraint will be discarded, and that the Supreme Court will decide in terms that common law criteria are those contemplated by the Act.

General and Partial Restraints of Trade under the Act. In the Trans-Missouri Freight Association Case, 53 Fed. 440, previous to the rigid interpretation in the Supreme Court, restraints of trade were classified much as at common law. General restraints were declared to be bad, whereas particular restraints either in respect to time or place are to be determined by their reasonableness and the presence of consideration to support the contract. In the view of the court no more definite line of reasonableness can be drawn than this: "Where the contract is publicly oppressive and the restrictions broader than are necessary for the protection of the other party to be benefited by the contract, then the contract is unreasonable and void, otherwise it is not. This is true of contracts having a direct tendency to prevent healthy competition but it is not so with those preventing unhealthy competition." This court then holds that the rules of restraint of trade under the statute are practically the same as those at common law: the detriment to the public and the benefit to the parties constitute the tests for the validity of such contracts.

The evils of restraints of trade and their historical development were discussed at length by the lower court in the case of United State v. Addyston Pipe & Steel Company, 85 Fed. 296. "1. Such contracts injure the parties making them, because they diminish their means of procuring a livelihood, and a competence for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisition, and they expose such persons to imporition and oppression. 2. They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the produce of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly."

The court considers that contracts in restraint of trade are at present lawful if they are made by the seller of a business who agrees not to compete in such a way as to hurt the value of what was sold; by a retiring partner, not to compete with the firm; by a partner pending the partnership, not to hurt the firm; by a buyer, not to use the property bought so as to compete with that retained by the seller; by a servant, not to compete after the time of service. Nevertheless, it must be found that these contracts are reasonably necessary to the enjoyment of the subject matter of the contract, and that they contemplate legitimate ends, such as the prevention of injury, or protection from loss to the business. The main purpose must in every case be one of these, and the covenant in restraint ancillary merely, and not exceeding the necessity. This doctrine of the lower court is the more interesting because in this case on appeal the rule of direct restraint

was substituted for it and all questions of reasonableness put aside.

This common law interpretation of contracts in restraint of trade is again apparent in the cases decided after the Standard Oil Case. For example, in Union Pacific Coal Company v. United States, 173 Fed. 737, it was said: "If the necessary effect of combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law."

The question has repeatedly been raised whether the size of the combination restraining interstate commerce is to be taken into consideration in determining the legality of its contracts. In the Swift Case there seem to be intimations that this is the case; but whenever counsel have attempted to argue on this point, such an interpretation of the statute has promptly been discouraged. The present rule is apparently that the volume of business in itself is no criterion, but that it may indicate a restraint which would not be possible were it not for the size of the interests of the concern. Of itself, the restraint may apply only to a small portion of interstate commerce, and still be within the prohibition of the statute. Steers et al. v. U. S. 192 Fed. 1.

At one time an attempt was made to distinguish between restraints in staple commodities and in others. In his dissenting opinion in the Trans-Missouri Case, Shiras J. urged in the Circuit Court of Appeals the common law distinction between the two kinds of restraint, claiming that all restraint is prohibited in the case of staple commodities, and that transportation is so analagous to these commodities that

it should fall within the same rule. This attempted distinction did not meet with favor, possibly for the reason that immediately after this statement the rule was adopted that the Sherman Act applies to all restraints regardless of their nature. Under the recent decisions, however, the question may well come up for discussion again. It was undoubtedly true that at common law all restraints in staple commodities were prohibited, on the ground that public policy demanded absolute freedom of traffic and exchange in the necessities of life. As the Sherman Act more and more approximates the common law in its essential elements, it may be that the courts will be called upon to decide whether the public policy of the present day demands the same distinction. Certainly there is an opportunity for argument along these lines, and it seems probable that before long the problem must be decided.

The Rule of Direct Restraint. After the decisions in the Freight Cases that the Sherman Act includes all contracts in restraint of trade regardless of their inherent reasonableness, it became necessary that a test be found which should determine the application of the Act to any given case. Common law principles being no longer available, the courts were obliged to formulate their own guides for the construction of the Act. Several such rules were offered, the chief of which must be considered the doctrine that if the contract in question directly affects interstate commerce, it is within the scope of the Act. Under this interpretation the important fact to be determined in any restraint concerns the directness with which the contract implicates interstate commerce. If it is shown that the interstate character of the commerce is nedessarily involved by the restraint and that it is directly

affected thereby, then the restraint is illegal. If, however, the restraint is ancillary merely, that is to say, if a contract involving interstate commerce incidentally puts some restraint upon it, then it is valid unless this incidental restraint is carried so far as to amount practically to a regulation of it. In the Addyston Pipe & Steel Case it was said on appeal that if an agreement or combination directly restrains not only the manufacture but the purchase, sale, or rechange of the manufactured commodity among the several states it is then brought within the provisions of the statute since the effect is to regulate commerce. In United States v. Chesapeake and Ohio Fuel Co., 105 Fed. 93, the question of the ancillary nature of the restraint there in issue was discussed and the court confirmed the theory that the proper test of the Act is the necessary and direct effect upon commerce. In Standard Oil Case, 173 Fed. 177, Hook J. considers that this test of the direct and appreciable effect of any given restraint is the only proper one, and he favors it as opposed to the "rule of reason" on the ground that conceptions of reasonableness are much too diverse to form a stable and uniform rule for the construction of the statute.

The Rule of Competition. During the period of rigid interpretation, besides the rule of direct restraint above set forth, the courts attempted to formulate a rule of competition, which some considered a supplement to it, and which others advanced as a substitute for it. This rule is a direct outgrowth of the statement of the Supreme Court in United States v. Trans-Missouri Freight Association Case 166 U. S. 290 to the effect that the act of Congress is aimed at all restriction of interstate commerce, and that we need not discuss the reasonable-

ness of such restriction. The Court considered that it was evidently the purpose of the law to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts or conspiracies, or monopolies whatsoever.

Adopting this view, the court in the Northern Securities Case said that the mere existence of such a combination as that at bar, and the power acquired by the holding company as its trustee, constituted a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. It furthermore considered that every combination or conspiracy which would extinguish competition in interstate trade or commerce and which would in that way restrain such trade or commerce, was illegal under the Act. So clearly did the court hold this to be the rule that it stated in terms that the rule for international and interstate commerce adopted by the Trans-Missouri Freight Association Case was that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting it. Neither did it consider that any constitutional right, such as the guarantee of liberty of contract was jeopardized under such a rule, since free competition must of its very nature facilitate freedom of contract. Holmes J., however, refused to assent to this theory on the logical ground that the statute says nothing about competition and only refers to those contracts and combinations in restraint of trade which do in fact restrain it, regardless of the way in which such restraint comes about. He significantly points out that a contract may derive its character as restraining trade from other features than the suppression of competition alone.

The rule of competition met with increasing favor in the years following the decision in the Northern Securities Case, and at the time when the Standard Oil Case was decided it seemed that this rule had already been definitely incorporated into the Sherman Act. At that time the general theory seemed to be as stated in the case of United States v. MacAndrews & Forbes Company et al, 149 Fed. 822: "Restraint, combination and monopoly is to be determined by the effect on interstate commerce, which need not be a total suppression of trade, nor a complete monopoly, but is sufficient if the necessary operation tends to suppress competition, and to restrain interstate commerce." In the Standard Oil Case itself, in the lower court (173 Fed. 177) it was held that the purpose of the statute was to keep the rates of transportation and t e prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties whereby the control of such rates or prices, is taken from separate competitors in a given trade and vested in a person or an association of persons, in the opinion of the court necessarily restricts competition and restrains commerce in the sense intended by the Act.

Since the decision of the Supreme Court in the Standard Oil Case, the importance of the rule of competition has been greatly lessened, although as it was not definitely repudiated in that Case it nevertheless must be still regarded as an ancillary criterion for the determination of the application of the Act. The cases decided in the present period recognize that the rule of competition cannot be cited with the authority which it formerly possessed; many of them have stated definitely that provisions making a combination illegal do not make every combination unlawful on account of the fact that competition is thereby restrained, but recognize that there may be a restraint of com-

petition which is not within the meaning of the Act. United States v. E. I. Dupont de Nemours & Co. et al, 188 Fed. 127.

The Rule of Reason. The earlier tests as to the meaning of the Act were repudiated by the decision in the Standard Oil Case except in so far as they can be brought into harmony with the rule there adopted, to the effect that common law principles of reasonableness and unreasonableness are the tests by which restraints of trade are to be judged. Chief Justice White reasons that inasmuch as the term "contracts" is not expressly defined, "it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case, a particular act had or had not brought about the wrong against which the statute provided". Hence although the Chief Justice does not say that the common law must be regarded as the test for the Sherman Act, and although he avoids the statement that the validity of a contract at common law is the same as that under the Act, it seems to follow from the language of this quotation, that the "rule of reason" is the same rule of reason that has long been known to Anglo-Saxon common law. This conclusion is the more necessary because it offers the only means of escape from that indefiniteness of "reason" so strongly objected to by the courts from 1897 to 1911. If the common law is made the test of reason, then this question is not

left to the individual consciences of judge and jury but rests on precedents as formally established as those in any other branch of law. Reason then becomes synonymous with "that which has been decided to be reasonable" and not with the conception of reasonableness held by an individual or a group os individuals.

Intent under the Act. Questions have at times been raised in actions brought under the statute, regarding the necessity for proof of intent. Defendants have occasionally urged the fact that as this is a criminal statute, the rule of the criminal law, that act and intent must agree, is valid and that actual proof of intent must be offerred in order to secure a conviction under the penal provisions of the Act. This contention has not been received as of much importance, however, since while it is admitted to be true, it is held under the Act to amount to a rule of pleading, rather than of positive law. In re Corning 51 Fed. 205. This results from the fact that under the present construction of the statute, intent is deducible from the act, and that it is useless for a defendant to say that he did not intend to regulate or affect interstate commerce. The intention to make the very combination or agreement which in fact is made in any given case, is held to contemplate its necessary and direct results. U. S. v. Addyston Pipe & Steel Co. 175 U. S. 211.

Conspiracy under the Act. In the case of conspiracy prohibited by the Act, an interesting question arises as to the necessity for an overt act. The ordinary offence of conspiracy under the federal law must be accompanied by an overt act according to Rev. St. 5440. But under the Sherman Act it has been held that no overt act is necessary, the conspiracy itself being the offence, as at common law. U. S. v. Kissel et al. 173 Fed. 823. This case discusses the offence of conspiracy in restraint of trade at considerable length, and in addition

to the valid decision regarding the overt act, it was held in the lower court that a conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. This definition of conspiracy in restraint of trade was not accepted on appeal, however, where the court declared that such conspiracies are different from and more than contracts in restraint of trade. "A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. A conspiracy is a partnership in criminal purpose". Monopolies under the Act. As a preliminary to a discussion of the meaning of monopolization under the Sherman Act it must be stated that the mere size of a combination has of itself nothing to do with its legality. In re Greene 52 Fed. 104. The mere extent of acquisition of business or property achieved by fair and lawful means cannot be the criterion of monopoly with in the meaning of the Act. In addition to acquisition and acquirement there must be an intent to exclude others from the traffic or business involved, and this by unlawful means. U. S. v. Reading Co. 183 Fed. 461.

In the Greene case the court considered that a monopoly involves the element of an exclusive privilege or grant which restrains others from the exercise of a right or liberty which they possessed before the monopoly was secured. In the law of commerce, it is necessarily an abuse of the freedom of that commerce, by which one or more individuals have procured the advantage of selling alone, exclusively, all of a particualr kind of merchandise or commodity, to the detriment of the public. The court discusses the common alw form of monopoly as expounded by Blackstone, 4 Bl. Comm. 159, and by Coke, 3 Co. Inst.187, which is a grant from the sovereign power of the state by concession,

letters patent, or otherwise, to a person or corporation, under which the grantee obtains the exclusive right of buying,,selling, making, or using the subject matter of the grant. Two elements are included: an exclusive right or privilege on the one side, and a restriction or restraint on the other, which operate to prevent the exercise of a right or liberty formerly open to the public. The court intimated that these elements of privilege and restraint still existed in the law of monopoly at the time of its decision and that accordingly an exclusive right in a portion of trade or commerce must be secured by means which prevent or restrain others from engaging therin, in order to bring the case within the provisions of the statute. This doctrine besides eliminating the necessity for a grant from the sovereign, introduces an element not emphasized at common law, namely, the means which bring about the exclusion of the public at large from traffic in the monopolized article. This question of the means whereby others are excluded from the enjoyment of the pre-existing right may be considered

The Gist of Monopolization. In the Standard Oil Case, 173 Fed. 177, the District Court intimated that the acquirement of the entire trade in a certain commodity by a single person or corporation, is not the essential element of the unlawfulness of the monopoly, but that the combination and conspiracy to secure the trade make it illegal. This is so because every sale and transportation is insofar forth monopolization, because it is an exclusive enjoyment of the benefits of the given sale or carriage, and the statute must be construed to abate a mischief, not to interfere with such legitimate operations. Accordingly the combination and the conspiracy which in themselves constitute illegal means must be considered to make the transaction illegal, whenever it is so found to be. In the words of Hook J. "To constitute monopoly, there must be a wrongful element, which may con-

sist of acts or conduct which the law condemns and the benefit of which if set in a civil court of justice, could not be obtained." Monopolization contemplates the employment of means which prevent others from engaging in fair competition, such as the engrossing of trade, and the like. The essential idea of monopoly thus seems to be much the same as at common law, with this difference: That whereas the right enjoyed was made exclusive in the older law by a grant from the sovereign, under the Sherman Act it becomes exclusive by the use of unlawful means.

The difficulty in determining the meaning of monopoly under the Act rests on the fact that it is a question of considerable delicacy to decide exactly what unlawful means in the given case may be. In general, the unlawful means need not be condemned by the criminal law, nor need they be such that a civil suit for damages might grow out of their use, but it is sufficient if their validity would not be recognized in a civil case at law or in equity. Thus the fact that the several acts by which the purpose of the monopoly is attained, are lawful in character when taken in isolation, does not relieve them from illegality when viewed as elements of the whole, if unlawful in the light of their purpose and effect in combination. U. S. v. Reading Co. 183 Fed. 461. Neither must prices be directly affected by such unlawful manipulations of commerce, but it is sufficient if the power to control the price of a commodity exists, whether it is exercised or not. U. S. v. Patten et al, 187 Fed. 644.

Public Policy and Monopolies. Owing to the indefiniteness which arises from the fact that "unlawful means" are not susceptible of a hard and fast definition which should determine their nature in every case from an examination of the acts themselves, the status of the means employed must be dependent to a certain extent

upon the general public policy of the time in which they are used. With this in view, White J. in the Standard Oil Case spoke at length on the evils of monopolies, and the dangers which they offer at the present time. He considers that they are likely to be disadvantageous to the public in three respects: first, the monopoly is able to fix the price and offer the article for sale at a rate disproportionate to its actual value. Secondly, production can be limited by a monopoly so that highest returns accrue to the combination, and the public suffers on account of the artificial restriction. Thirdly, the monopolized article is likely to deteriorate in quality; when once the stimulus of competition is removed and a market assured, the standard of excellence tends to fall.

Considering that the public must be protected from these dangers, the illegality of the means which are employed to secure the exclusive trade in a commodity must be more or less dependent upon the likelihood of their injuring the public in one or more of the ways stated. In the opinion of Chief Justice White, no hard and fast rule can be laid down in this respect and he accordingly states that the second section of the Act must be examined in the same light as the first, to which it is supplementary. Hence it follows that the criterion of this section is the "rule of reason guided by the established law and the duty to enforce the prohibitions of the Act." "Unlawful means", then, must be determined not only from an examination of decided cases, but with reference to the state of public policy at the time.

Attempts to Monopolize. The provision of the Act against attempts to monopolize interstate trade and commerce was in issue in Whitwell v. The Continental Tobacco Co., 125 Fed. 254, where the case arose without reference to any actual monopolication. The question whether every attempt to monopolize any part of interstate

commerce is unlawful, was raised, and was necessarily decided in terms, since there was no contention on the part of the government that any other provision of the Act was involved. The Court held that if this question should be decided in the affirmative, then every sale in inter state commerce is unlawful, as it is a successful attempt to monopolize that part of commerce which concerns that sale. This surely was not intended, because attempts by each competitor to monopolize a part of trade is the root of competition, and as such attempts are frustrated, then competition ceases. The purpose of both sections of the Anti-trust Act in the view of the court and of the Supreme Court at that time, is to help competition and accordingly no contract is denounced unless the effect is to restrict competition. In the case at bar the sole cause of action was a refusal to sell to the plaintiff and in the view of the court the defendant owed no duty to him so to do. "An attempt to monopolize a part of interstate commerce which promotes or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the second section because such attempts are indispensable to the existence of any competition in commerce among the states."

Remedies Under the Act. From the point of view of remedies the statute necessarily departed from the procedure under the common law, both because of the constitution of the federal courts and because the common law remedies for offences against trade and commerce were cumbersome in the extreme. Under the Act, the circuit courts were invested with jurisdiction to prevent and restrain violations of the Act by injunction, on petition of the several district attorneys of the United States, under the direction of the Attorney General.

Temporary injunctions might be granted pending the final decree of the court. The court may cause witnesses and other persons concerned to be summoned whether they reside in the district in which the court is held or not, by subpoena served by the Marshal of the district. Property involved in any violation of the Act, and in the course of transportation in interstate traffic, may be forfeited to the United States, and seized and condemned under proceedings similar to those provided for forfeiture and condemnation of property imported into the United States contrary to law. A provision was also made for three-fold damages, together with costs and a reasonable attorney's fee, to be recovered by any person injured in his business or property through unlawful acts of persons or corporations.

Prior to the Act approved Feb. 25, 1903, there was no way in which a witness could be compelled to testify in a proceeding under the Act, before a grand jury as to the witness' connection with the combination. Foot v. Buchanan, 113 Fed. 156. This was because the Sherman Act was a criminal statute. The Act of Feb. 25, 1903, (Laws 1903, ch. 755) extended to the Sherman Act the provisions of Sec. 860, U. S. Rev. St., declaring that no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence in any proceeding under the Act. At the present time, then, witnesses may be compelled to testify both before a grand jury and at the trial of a case under the Act, and can no longer take refuge behind that provision of the criminal law which excuses any person from incriminating himself.

Several technical rules of pleading arise under the statute, but inasmuch as they do not involve the substantive law, they may be dis-

missed with little discussion. Chief among these rules is pe haps that one which declares that a violation of the Act cannot be raised in a collateral proceeding. In Lafayette Bridge Co. v. the City of Streator, 105 Fed. 729, it was held that it could not be pleaded as a defense to a suit for payment for goods, that the seller is a trust and within the provisions of the anti-trust law. Another rule of considerable importance is to the effect that the statute while containing criminal provisions is now recognized as remedial. In Rice v. The Standard Oil Co. 134 Fed. 464, a strict rule of pleading was enforced on the theory that the Act was penal only, but this doctrine has been repudiated. Addyston Pipe & Steel Co. Case, 175 U. S. 211. Northern Securities Co.Case 193 U.S.197. Montague v.Lowry, 193 U. S. 35.

Two minor points raised in regard to damages recoverable may be stated here: These are the difference between the price paid, and the reasonable price of the commodity under natural competitive conditions, City of Atlanta v. Chattanooga Foundry Co.,127 Fed. 23. The provisions for the recovery of three-fold damages do not apply in the case of one who was himself a party to the trust. Bishop v. American Preserves Co., 105 Fed. 845.

D. "The True Reason of the Remedy." (Purpose of the Act.) The Influence of Economic Conditions. At the time that the Sherman Law was enacted, industrial conditions in the United States had been rapidly approaching a crisis, and it was becoming more and more evident to far-sighted legislators that a small minority in the economic organization of the country was getting control of an increasingly disproportionate aggregate of capital. The remarkable advance in all lines of development in trade, commerce, and means of

communication, carried in its train an extension of devices securing the control of vast enterprises, hitherto without precedent either here or abroad. Debates in Congress at this time indicate that both houses were aware of the danger which threatened, and that they recognized some legislative action was imperative if freedom of trade was to be preserved. In the opinion of Chief Justice White, as expressed in the Standard Oil Case, these debates conclusively show that the main cause which led to the enactment of the anti-trust law was "the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporation and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals, and injure the public generally."

Tentative Bills. Previous to the passage of the Act of July 2, 1890 several bills were proposed in the Senate to deal wth governmental control of interstate trade. These are of importance in determining the legislative purpose of the Act as finally passed, since they, together with discussions upon them, indicate the attitude of Congress towards the problem. The first of these was a bill introduced by Senator Sherman on December 4, 1889 which contained substantially the following provisions: first, it declared to be against public policy, unlawful and void, all arrangements, contracts, agreements, trusts, or combinations between persons or dorporations, contemplating the prevention of full and free competition in interstate traffic in articles imported into the United States, or produced here; and in the production and manufacture of such articles; secondly, the bill prohibited

any agreements or corporations which were designed or tended to advance the cost to the consumer of any of these articles. From this it appears that the gist of the proposal was to prohibit interference with competition and also to prevent artificial advances in the price of articles in interstate and foreign commerce. This bill was referred to the Senate Committee on Finance and was reported on January 14, 1890. On February 27, Senator Sherman moved the Senate to proceed to the consideration of the bill and discussion of its provisions immediately began. Doubt was expressed as to the constitutionality of the bill, notably by Senator George of Mississippi, who further objected that the prohibition was confined to conspiracies against trade and did not include overt acts done in pursuance of them. On account of this and other objections, the Committee on Finance presented a substitute for the bill on March 21, 1890, which proposed to strengthen its constitutional foundation by confining its prohibitions to combinations of citizens of different states. For this amendment Senator Reagan of Texas offerred a substitute which attempted to define restraints of trade and monopolies so accurately as to remove any doubt as to the effect of the Act upon any given transaction. Debate upon these two substitutions for the original bill showed that while particular senators objected strongly to one or the other, nevertheless there was a general consensus of opinion that the object for which they were both intended was highly important, and that it was merely a question of what form the law should take.

The Passage of the Sherman Act. On April 2, 1890, Senator Edmunds, the chairman of the Judiciary Committee, reported back the original Sherman bill and its amendments, accompanied by a new substitute for them all. That substitute, probably drawn by Senator Hoar of Massachusetts and not by Senator Sherman as is commonly supposed, was

identical in every word with the Sherman Act as it was afterwards passed by both Houses of Congress, and approved by President Harrison on July 2, 1890. Consideration of the Hoar substitute for the Sherman bill began on April 8, 1890, on motion of Senator Hoar. The bill was passed by the Senate and sent to the House, where on April 11, 1890, it was taken from the speaker's table and referred to the House Committee on Judiciary. In the House, an amendment was offerred by Mr. Bland of Missouri to the effect that agreements preventing competition in the sale or purchase of commodities transported from one state to another should be prohibited, together with combinations preventing competition in transportation of persons between States or Territories. In the Senate, this amendment was again amended so that only the second proposition was allowed to stand in the bill as revised. After conferences between the House and Senate, however, it finally came about that both amendments were dropped, and the Act as originally proposed was passed in both Houses, and approved by the President.

From an examination of the various bills offerred to regulate monopolies and restraints of trade, it is evident that the primary purpose of Congree was to prevent undue suppression of competition. Exactly what restraint of competition was due and what undue, however, does not appear from the body of these bills and neither does it appear that the members had any clear opinion of the dividing line between proper and improper control of competition. In three respects the debates throw some light on the meaning of the words, "restraint of trade",although the common law question of reasonableness seems not to have been raised. In the first place,the members of Congress considered that "restraint" is indicative both of mutual restraint between the

members of a combination and of extraneous restraint exercised by the combination as a whole against one or more other parties. Next, the fact was emphasized that restraints prohibited by the Act were confined to direct restraints of interstate commerce, but the precise line between direct and indirect restraints was not drawn, nor was any distinction made between reasonable and unreasonable restraints. Finally restraints under the Act were not intended to be unlawful if they were not extensive enough to be materially injurious to public or private welfare. In regard to the second section of the Act the view of Senator Edmunds was general; namely, that the word "monopolize", in law includes the idea that the monopolist in acquiring the thing monopolized in some way prevented others from competing with him in attaining complete control of the given trade or industry. Senator Hoar stated that the members of the Judiciary Committee of the Senate agreed that the word monopolize means " engrossing to a man's self by means which prevent other men from engaging in fair competition with him". Cong. Rec. 51 Cong. 1st. Sess., 3151. From this it follows that Section 2 is not violated where a party completely acquires a particular part of interstate or international commerce by means of his superior skill or superior facilities.

Contemplated Dependence upon the Common Law. There seems to be no direct evidence that the question of the relation between the Sherman Act and the common law was raised in the case of restraints of trade. Probably much of the later confusion in the interpretation of the first section resulted from the fact that there was no definite idea as to its application; nor was the precise degree to which it was dependent on the common law specified or discussed. In regard to the second section, however, we are fortunately able to know the exact atti-

tude of the Senate on the contemplated relationship between the statute and the common law. During debate on this section, after Senator Hoar had promulgated the definition of monopoly above set forth, Senator Kenna inquired whether such a monopoly as had been defined was prohibited at common law. On the reply of Senator Hoar that he so understood, Senator Kenna thereupon asked why a bill should be passed to denounce a monopoly already illegal at common law/ To this Senator Hoar replied that there was no common law of the United States, and that the common law of the separate states cannot, as such, be enforced by the federal courts by means of any penalty or punishment. Cong. Rec. 51 Cong. 1st. Sess. 3151.

It is evident from the foregoing that Congress recognized that no action could be taken by the federal government against trusts and monopolies, unless positive enactment to that effect were made. If common law principles were adequate to deal with the problem, it was nevertheless necessary that they be incorporated into the federal law by legislative sanction. The question now comes in this form: Did Congress actually intend to make use of common law principles, and is the Sherman Act nothing more or less than the realization of this intention? A definite answer, complete as to every phase of the subject, cannot be given, but one or two facts can be specified which are valuable in throwing light on the whole. In the first place, Congress certainly intended a departure from the common law in respect to remedy; federal procedure required a departure from involved common law principles of pleading, bith because of the increasing tendency to simpolfy all matters of adjective law, and because the ends of justice would best be served by the processes of equity rather

than by those of the law courts. It is equally certain that the second section of the Act contemplated no departure from the common law. The question was definitely raised in the manner described above, and the entire purpose of the statute in so far as it concerned monopolies was to embody the common law in United States law. The indeterminate part of the problem arises in reference to the first section, and here no light can be obtained from statements made on the floor of Congress. So far, then, we must say that the actual intent of those who passed the bill cannot be determined. But there is one indication that common law principles should be decisive of points raised in the interpretation of the Act, and that is this: the Sherman Act avowedly adopts the common law in dealing with monopolies; why, then, should it be interpreted as meaning something entirely different from the common law in regard to restraints of trade, especially when such a departure is not definitely announced? The law of monopoly and that of restraints of trade are mutually supplementary; they both deal with one great problem, the violation of public rights in the freedom of trade and commerce. The guiding principles of the common law have been chosen to regulate monopolies, thus disposing of one side of the question. Without some strong intimation to that effect, it does not seem likely that in dealing with the other part of the case these legal rules should be abandoned and other tests set up in their stead. This is the more true, because any new test substituted for established criteria is necessarily untried; and it is impossible to determine in advance of judicial interpretation what its exact effect will be. Were such a new test to be formulated, it would seem probable that extreme care would be taken by the legislative body to specify exactly those cases to which it should apply. In the discussion of the

Sherman Act, however, the course of events in both Houses of Congress shows that to some extent they were content to let judicial interpretation guided by established principles, determine the application of the new law against restraints of trade. That being so, their general intention was plain, but their specific intention was no more definite than to afford a remedy against the increasing encroachments of combinations on the liberty of individuals. In cases like these, when there is no specific intent, the general intent must be interpreted in terms of pre-existing law; there is no alternative. And this pre-existing law must be the common law, for there is no other body of decisions on which to rely, when the construction of an entirely new statute is in issue.

III. Summary and Conclusion.

It remains to summarize the major and minor premises, and to draw the conclusion from them. The major premise analyses the common law in regard to contracts, combinations and conspiracies in restraint of trade and monopolies; and the minor premise analyses these same agreements and devices under the Sherman Act.

Summary of the Major Premise. Restraints of trade are to be considered as voluntary or involuntary. Involuntary restrai ts are by grants or charters from the crown, or by custom, and are not of present importance in the discussion of principles controlling the rights of parties who themselves enter into contracts restraining trade. In modern times, only voluntary restraints are prominent, since they alone determine the relationship between the subject and the sovereign when the question of freedom of trade and commerce arises. Voluntary restraint in order to be valid must be partial, must rest on an adequate consideration, and must be reasonable. Reasonableness is determined by striking a balance between the injury to the party restrained or to the public, and the use to the party receiving the benefit of the transaction. The injury to the party and to the public is to be determined in the l ight of public policy which necessarily varies from time to time. At common law contracts in restraint of trade were unlawful merely, and void, and no criminal liability attached. Combinations and conspiracies i restraint of trade on the other hand were prohibited as misdemeanors or felonies as the case might be, both at common law and under early statutes. These were defined in a series of statutes extending from the time of the Anglo-Saxon kings to the reign of George the Third. Monopolies at common law and under

these early statutes were punishable as crimes. To constitute a monopoly, four elements are necessary: a grant from the sovereign, a definite grantee, a particular benefit or right given to that grantee, and an exclusion of the public at large from participation in rights or privileges formerly enjoyed.

Summary of the Minor Premise. The Sherman Act has passed through three periods of interpretation:one in which it was broadly interpreted in the light of the Common Law, another in which its language was considered to apply to all restraints of trade, whether lawful or unlawful at common law, and a third in which judicial opinion reverted to that of the first period. In determining the relation of the Act to yhe Common Law, only those rules and decisions need be considered authoritative which are not inconsistent with the final construction of the Act adopted by the Supreme Court in the Standard Oil and Tobacco Cases. Under these decisions, and under others not contrary to the rulings there laid down, restraints of trade must now be decided under the "rule of reason". This "rule of reason" includes as pre-requisites the doctrine that the restraint must be partial and must rest upon adequate consideration, and in addition, it contemplates, as asserted by Chief Justice White that the inherent reasonableness of the transaction shall be examined in accordance with pre-existing principles of the common law. These contracts, however, as contrasted with their common law status, are now made criminal. Combinations and conspiracies under the Act may include unlawful contracts, but they are something more: an unlawful element must appear, and whether this takes the form of an unlawful agreement or of an illegal device for the suppression of competition, or the like, its presence, together with the fact that interstate trade and commerce is actually restrain-

ed, constitutes the offence. No overt act is necessary in the case of conspiracies in restaint of trade, as the agreement of the parties to it, is the crime prohibited. Monopolies under the Act, although some indefiniteness still remains in the interpretation of the second section, seem to be practically identical with common law monopolies, when once the necessity for a grant from the sovereign is removed. The exclusive right formerly granted by the king, is now obtained by the use of unlawful means in the suppression of competition or in preventing the public at large from participation in the given industry. In the case of remedies and of the adjective law applicable to the interpretation of the Act in general, there is a sharp departure from the common law procedure, but this is no greater than must necessarily result from the progress of the law in dealing more effectively with all kinds of offences.

Conclusion. In formulating the conclusion to the syllogism set forth at the beginning of this dissertation, essential points of identity in the construction of the Sherman Act and in the Common Law must be regarded, and details of adjective law may be neglected in determining the actual relationship between the Statute and the Common Law. This dissertation is not intended to prove that in all respects cases under the Sherman Act must be decided in accordance with previous decisions at the common law, but that the underlying principles are the same in both cases. From the analyses of decisions under the two bodies of law, it appears that in regard to both restraints of trade and monopolies, the principles on which the individual judgments rest, are identical. The validity of contracts restraining trade was at common law dependent on the presence or absence of three elements, namely: was the contract partial, did it rest on adequate consideration, was it reasonable? The

reasonableness of the contract is dependent in turn upon the benefit to the obligee, the detriment to the obligor, and the effect on the public at large. If the detriment to the obligor and to the public was incommensurable with the benefit received by the obligee, then the contract was unlawful. Under the Sherman Act the same elements are necessary to the legality of such contracts; not only must it be partial and rest on adequate consideration, but since the decision in the Standard Oil Case, it must be reasonable. The reasonableness is that reasonableness which has been defined by common law courts, and since this is so it must necessarily be reasonableness dependent on the usefulness of the contract to the party receiving the benefit of it, as compared to the damage sustained by the party making the contract, and to the general effect upon interstate trade and commerce. Although the court has not in terms declared that these three elements must appear in order to make the contract legal under the present interpretation of the Act, nevertheless before the period of rigid interpretation was entered upon, the courts in general recognized these three elements as constituting reasonableness. It does not follow from the identity of these rules in regard to restraint of trade that the federal courts are bound by early cases at the common law, but it does follow that these same early cases must be regarded as of controlling influence in formulating rules under the present application of the Act. That is to say, that whereas public policy has shifted, and whereas a restraint which might once have been of detriment to the public is no longer such that it interferes with the freedom of trade and commerce, nevertheless the fundamental principles upon which original cases rested, are still valid in our law today. The question of public policy is the only variable factor in the equation, and when allowance has once been made for a change in its point of

view, the other questions are now the same as in the former times. This indicates no change in the law itself, but emphasizes rather a change in economic conditions under which the law is applied. A contract injurious to the public in one age may be a positive benefit to it in another, and the case will be decided one way in the earlier period and another in the later. Yet, although the actual decision is different, the principles on which it rests are the same. At both times, there is a balancing of benefit to the one and detriment to the other; and the economic development of the nation determines which way the balance falls.

Combinations and conspiracies under the Act tend naturally to be grouped with monopolies rather than with restraints of trade proper. This is so for the reason that the essential element in the constitution of these offences is the unlawful means whereby they are effected, rather than in the fact that they actually restrain trade. Early statutes against engrossing, regrating, and forestalling the market, practically amounts ~~and~~ to statutes against what are now called combinations and conspiracies in restraint of trade. Considering these offences to be the same in spite of the change in name, it appears that both at common law and under the federal law, unlawful means was the criterion upon which their legality dependended. While the act of engrossing, regrating or forestalling, itself constituted the offence, nevertheless, in the final analysis, all these crimes amounted to transactions restraining trade in a prohibited manner. Hence it is, that the means is important in these early statutes. The actual securing of staple commodities was not the gist of the offence

in any case, but this was rather the way in which they were obtained.

Monopolies at common law contained the four elements already explained at length, namely: the grant from the king, the definite grantee, the exclusive right, and the restriction of others from participation in that right. Gradually both in England and in this country, the first requisite of a monopoly was done away with, both in the common thought of the people and in the law as well. At present however, it seems that monopolies are identical with those prohibited by the common law, except for the fact that the original grant is not nevessary. At both common law and under modern definitions of the offence, it is the usurpation of the control of a trade or industry by one man or by a body of men, together with the disregard of the rights of the public generally, which was and is considered the gist of the offence. The difference arises only in the way in which the monopoly is secured; formerly it was by express grant, whereas not it is by the acts of the individual. These acts must be unlawful, as otherwise there would be a restriction upon acquisition of property by simple skill and industry, an idea which is repugnant to the Anglo-Saxon mind. Other than this, however, there seems to be no fundamental difference between monopolies now and formerly, as in both cases it is the assumption of rights belonging to the public which tinge the transaction with criminality.

Finally, then, by comparison of the major and minor premises, it is apparent that the effect of the Sherman Act in regard to restraints of trade and monopolies is the same as that of the common law, except in regard to remedy, which is essentailly adjective and not substantive law. And it follows from this identity of principles that the "rule of reason" is the "reason" of the decided cases in England and

the United States before the passage of the Act, which itself is definite and possible of exact determination, in so far as any rule of law dependent upon public policy can be fixed and not liable to change.

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